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In the

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Michigan Constitution, Mich Const 1963, art I, §20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that criminal defendants who plead guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

I. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?

II. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

PARTIES TO THE PROCEEDING

In the courts below, the plaintiffs challenging the constitutionality of the Michigan statute were three indigent criminal defendants, John Tesmer, Charles Carter, and Alois Schnell, and two criminal defense attorneys, Arthur Fitzgerald and Michael D. Vogler (referred to as "Respondent Attorneys" in this Petition).

The defendants below and the Petitioners here are three Michigan State court judges, John F. Kowalski, William A. Crane, and Lynda L. Heathscott.

The then Attorney General of Michigan, Jennifer M. Granholm, was initially named as a defendant but was dismissed by the District Court, was not a party to the appeal below, and pursuant to S Ct R 12.6 Petitioners believe she has no interest as a party in the outcome of this Petition.

The District Court entered an opinion and order on March 31, 2000, declaring the State statute unconstitutional.

On June 30, 2000, the District Court entered an injunction against Petitioner Heathscott; against another State judge, Respondent Dennis C. Kolenda, who was not a party to the lawsuit; and purportedly against all other Michigan State judges. The interests of Respondent Judge Kolenda are not adverse to the interests of Petitioners.

Petitioners Judges Heathscott, Kowalski, and Crane appealed to the United States Court of Appeals for the Sixth Circuit in case No. 00-1824. Respondent Judge Kolenda filed a separate appeal in case No. 00-1845. The Court of Appeals issued a joint *en banc* opinion and judgment on rehearing in the two appeals on June 17, 2003.

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OPINIONS AND ORDERS BELOW

On March 31, 2000, the United States District Court for the Eastern District Of Michigan entered an opinion and order declaring that both Michigan Compiled Law (MCL) 770.3a and the practice of denying appointed appellate counsel to indigent criminal defendants who have been convicted by guilty pleas[1] unconstitutionally denied them equal protection and due process under the United States Constitution; declaring that Respondent Attorneys had third-party standing; abstaining from deciding Respondent Tesmer's claims, but not Respondent Carter's or Schnell's; and dismissing defendant Attorney General. The Court granted in part and denied in part Petitioners' motion to dismiss and denied Respondents' motion for a preliminary injunction. *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich, 2000). App. 87a.

In proceedings not pertinent to the present Petition, Petitioners filed a notice of appeal from the March 31, 2000 opinion and order but the notice misidentified the opinion and order and pursuant to a motion by the Respondents the Court of Appeals dismissed that appeal in an unreported order on July 13, 2000. Petitioners filed a motion for rehearing and rehearing *en banc*. On October 13, 2000 the Court denied that motion in an unreported order for the reason that the March 31, 2000 opinion and order did not constitute a final judgment.

Meanwhile, Respondents filed motions in the District Court for class certification and for injunctive relief, contending that Petitioner Heathscott, a Saginaw County Circuit Judge, and Respondent Kolenda, a nonparty Kent County Circuit Judge, were violating the District Court's earlier opinion and order by refusing to appoint appellate counsel for non-party indigent

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[1] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For convenience, this Petition uses the term "guilty plea" to apply to all three types of convictions.

criminal defendants who had been convicted by guilty pleas. On June 30, 2000 the District Court issued an opinion and order that enjoined Petitioner Heathscott and purported to bind Respondent Kolenda and all Michigan State judges from denying appointed appellate counsel. The District Court declined to certify either a plaintiff or a defendant class. *Tesmer v Kowalski*, 114 F Supp 2d 622 (ED Mich, 2000). App. 125a.

Petitioner Judges appealed from the June 30, 2000 opinion and order. Respondent Kolenda filed a separate appeal. On July 2, 2002, a panel of the United States Court of Appeals for the Sixth Circuit entered a decision concluding that the District Court should have abstained from deciding the claims of all three Respondent criminal defendants; that the Respondent Attorneys had third-party standing; and that MCL 770.3a sufficiently protects an indigent defendant's constitutional rights. The Court dissolved the injunction issued by the District Court, reversed and vacated the grant of declaratory relief, and remanded the matter with instructions to enter judgment in favor of Petitioners. *Tesmer v Kowalski*, 295 F 3d 536 (6th Cir, 2002). App. 63a.

Respondents filed a motion for rehearing *en banc* that was granted on September 20, 2002, which had the effect of vacating the panel decision. *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002). App. 85a.

On *en banc* rehearing, the Court of Appeals entered a 7-5 decision on June 17, 2003, affirming the District Court in part and reversing in part. The majority held that abstention applies to the indigent defendants; that the attorney-plaintiffs have third-party standing; that the statute "create[s] a different opportunity for access to the appellate system based upon indigency" and therefore violates due process; but that the injunction was improper with respect to Judge Kolenda and all non-party Michigan State judges. In separate opinions, four

Judges dissented from the holding that the attorneys had third-party standing and four dissented from merits of the constitutional issue, concluding that "the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system." *Tesmer v Kowalski (on en banc rehearing)*, 333 F 3d 683 (6th Cir, 2003). App. 1a.

JURISDICTION

The Court of Appeals *en banc* judgment on rehearing was entered June 17, 2003. No rehearing was sought from that judgment. This Court's jurisdiction in invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

The pertinent federal and Michigan constitutional provisions, statutes, and court rules involved are reproduced in the Appendix at App. 137a.[2]

The challenged statute, MCL 770.3a, (App. 139a) provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

[2] Current versions of the Michigan Court Rules can be found on the Michigan Courts Web site. See, http://courtofappeals.mijud.net/rules/public/default.asp

> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
>
> (4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal. [3]

The Michigan Court Rules (MCR) concerning guilty pleas conform to the statute. MCR 6.302(B)(5), (6). (App. 146a):

> (B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

[3] The form is reproduced at App. 157a and can be found on the State Court Administrative Office (SCAO) Web site. See, http://courts.michigan.gov/cao/courtforms/appeals/cc405.pdf

* * *

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;
(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and

(a) the defendant's sentence exceeds the guidelines,
(b) the plea is a conditional plea under MCR 6.301(C)(2),
(c) the prosecuting attorney seeks leave to appeal, or
(d) the Court of Appeals or the Supreme Court grants leave to appeal.

STATEMENT OF THE CASE

Appeals from criminal convictions based on guilty pleas to both the Michigan Court of Appeals and the Michigan Supreme Court in Michigan's two-tier appellate court system are discretionary. MCL 600.308(2)(d), 770.3(1)(d); App. 139a. A Michigan statute, MCL 770.3a (App. 139a) provides, with significant listed exceptions, that criminal defendants who plead guilty, guilty but mentally ill, or nolo contendere shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

The basis of jurisdiction of this 42 USC § 1983 lawsuit in the District Court was 28 USC §§ 1331, 1343(a)(3), and 1343(a)(4). Respondents asserted that the practice of denying appointed appellate counsel to guilty-pleading defendants in discretionary first appeals violates their right to equal protection and due process under the United States Constitution and that MCL 770.3a will continue to violate their rights. The United States Court of Appeals for the Sixth Circuit held that it would abstain from deciding the claims of the indigent defendants, that the attorneys had third-party standing, and that MCL 770.3a violates due process.

A. The Michigan Framework for Appeals From Guilty Pleas

In *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000) *cert denied,* 531 US 994 (2000), the Michigan Supreme Court held that neither the Michigan nor the United States Constitution requires the appointment of appellate counsel at public expense when a criminal defendant applies for leave to appeal a plea-based conviction. Because MCL 770.3a did not apply to the defendant there, the precise question of its constitutionality was not before the Michigan Supreme Court,

although the Court explicitly upheld the constitutionality of the practice of denying appointed counsel.

The Court in *Bulger* described in detail the history of the framework for appeals from guilty pleas in Michigan. 462 Mich at 503-506. Before 1994, Mich Const 1963, Art 1, § 20, provided defendants an appeal of right from all criminal convictions and, "as provided by law, when the trial court so orders, . . . such reasonable assistance as may be necessary to perfect and prosecute an appeal." Case law provided that defendants could appeal by right from plea-based convictions and therefore there was a right to appointment of appellate counsel. In 1994, a proposal to amend the constitution was submitted to the people to make appeals from plea-based convictions discretionary. In *Bulger*, 462 Mich at 504-505, the Michigan Supreme Court described the reasons for the constitutional amendment and the current status of the law:

> Eliminating appeals as a matter of right from plea-based convictions was suggested as a way to help control the case load of the Michigan Court of Appeals. By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and plea-based appeals constituted approximately thirty percent of all appeals facing the Michigan Court of Appeals. Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts.
>
> The voters approved [the constitutional amendment] by a margin of sixty-four percent to thirty-six percent. As amended, Const 1963, art 1, § 20 now states that an accused is entitled "to have an appeal as a matter of right, *except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . . .*" (Emphasis added.) [The amendment] did not alter the provision of art 1, § 20 that grants defendants "as provided by law, when the trial court so orders, . . . such reasonable assistance as may be necessary to perfect and prosecute an appeal." (Citations and internal quotation marks omitted.)

Michigan has a two-tier appellate court system. The intermediate appellate court, the Michigan Court of Appeals, has jurisdiction of appeals of right from final judgments or final orders of the circuit courts[4] or the court of claims.[5] Other appeals, including criminal cases in which the conviction is based on a plea of guilty, are discretionary, by leave granted. MCL 600.308(2)(d), 770.3(1)(d); MCR 7.203(A), (B); App. 139a, 151a. All appeals to the Michigan Supreme Court are discretionary, by leave granted. MCL 770.3(6); MCR 7.301; App. 139a, 158a.

The requirements for filing an application for leave to appeal to the Michigan Court of Appeals are set forth in the court rules. MCR 7.205. App. 149a. The Court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. If an application is granted in a guilty plea appeal, counsel is appointed (MCL 770.3a(2)(c); App. 140a) and the case proceeds as an appeal of right. MCR 7.205(D)(2), (3); App. 154a-155a.

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[4] The circuit court is the trial court of general jurisdiction, including jurisdiction over felonies and including appellate jurisdiction over lower courts. Mich Const 1963, art VI, §13; MCL 600.601. The District Courts have jurisdiction over misdemeanors, MCL 600.8311, and exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00. MCL 600.8301.

[5] The Court of Claims is a special court established to hear claims against the State. MCL 600.6419.

B. The Present Lawsuit

On March 2, 2000, a month before the statute's April 1 effective date, this lawsuit was filed by Respondents, three indigent criminal defendants and two criminal defense attorneys. The named defendants were three State court judges and the then Attorney General of Michigan, who was later dismissed by the District Court and is no longer a party.

Respondent Tesmer is an indigent who pleaded guilty in 1999 to a charge of home invasion, MCL 750.110a, and was sentenced by Petitioner Kowalski to a term of 9 to 15 years imprisonment. Petitioner Kowalski denied Tesmer's request for appointed appellate counsel on September 7, 1999, before MCL 770.3a took effect. Tesmer appealed the denial of counsel to the Michigan Court of Appeals and his appeal was pending when the District Court complaint was filed. The Michigan Court of Appeals denied his delayed application for leave to appeal on March 28, 2001. He did not seek appeal to the Michigan Supreme Court.

Respondent Carter is an indigent who pleaded guilty in 1999 to a charge of attempted murder, MCL 750.91, and was sentenced by Petitioner Crane to a term of life imprisonment. Petitioner Crane denied Carter's request for appointed appellate counsel on May 12, 1999, before MCL 770.3a took effect. Carter did not appeal, although a delayed application would still have been timely when the District Court complaint was filed.

Respondent Schnell is an indigent who pleaded guilty in 1998 to a charge of operating a vehicle under the influence of liquor, third offense, MCL 257.625, 769.11, and was sentenced by Petitioner Heathscott to a term of 5 to 10 years imprisonment. Petitioner Heathscott denied Schnell's request

for appointed appellate counsel on September 21, 1998, before MCL 770.3a took effect. Schnell appealed to the Michigan Court of Appeals, which denied his application on April 1, 1999. Rehearing was denied on May 25, 1999, and Schnell did not appeal to the Michigan Supreme Court.

Respondent Attorneys Fitzgerald and Vogler alleged that they are on lists of attorneys qualified to take assignments as appointed appellate counsel and that each of them "earns a portion of his income as an attorney taking assigned appeals from trial and plea based convictions." They alleged that the practice of denying appointed appellate counsel to indigent defendants convicted by guilty pleas had adversely affected their incomes and that MCL 770.3a "will adversely affect" their incomes because "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." Complaint, paragraphs 33-36. Neither of them represented any of the indigent criminal defendant Respondents. They asserted third-party standing under the doctrine of *jus tertii* to assert the constitutional rights of future indigent criminal defendants.

The opinions of the District Court and Court of Appeals are described in detail in the "Opinions And Orders Below," *supra*, at 1-3. For purposes of this Petition, Petitioners challenge the holdings that Respondent Attorneys have third-party standing, that indigent criminal defendants convicted on guilty pleas have a constitutional right to appointed appellate counsel on discretionary first appeals, and that MCL 770.3a is unconstitutional.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal law.

The first question has not been addressed by this Court and presents a direct conflict between the decision below and a decision of the Michigan Supreme Court. The Court of Appeals declared a Michigan statute unconstitutional and held that indigent criminal defendants who are convicted on guilty pleas have a constitutional right to taxpayer-paid appointed counsel for discretionary first appeals. This Court has not addressed this precise issue, but the Court of Appeals' holding is in direct conflict with the holding of the Michigan Supreme Court in *People v Bulger*, *supra*, 462 Mich 495.

The second question is presented by the Court of Appeals' holding that attorneys, whose only personal stake is an alleged adverse effect on potential future income, have third-party standing to assert substantive constitutional claims on behalf of unknown potential future indigent criminal defendants, even when it is proper to abstain from deciding the claims of the defendants themselves. This is contrary to decisions of this Court, particularly *Warth v Seldin*, 422 US 490 (1976).

This Court should grant certiorari to resolve the conflict and answer these questions.

I. Whether an Indigent Criminal Defendant Convicted on a Guilty Plea Has a Constitutional Right to Appointed Appellate Counsel for a Discretionary First Appeal is an Important Federal Question That Has Not Been Decided by This Court, and the Court of Appeals Decision Directly Conflicts With a Decision of the Michigan Supreme Court.

There is no constitutional right to an appeal. *McKane v Durston*, 153 US 684 (1894). This Court has held that if a State grants a right to a first appeal, then it cannot deny appointed counsel to an indigent, *Douglas v California*, 372 US 353 (1963). It has also held that after an initial first appeal by right to an intermediate State court of appeals, the constitution does not require appointment of appellate counsel for a subsequent discretionary appeal to a State supreme court. *Ross v Moffitt*, 417 US 600, 610, 612 (1974).

But this Court has never addressed the question of the present case: whether the constitution requires appointed counsel in a discretionary first appeal for a criminal defendant convicted on a guilty plea. The Court of Appeals below recognized that this Court has never addressed the precise question presented in this case, App. 19a: "The [Supreme] Court has yet to address the situation the statute presents, that of a discretionary first appeal. . . . We are left to fill in this gap."

The Michigan Supreme Court and the Court of Appeals have now addressed that question and have given conflicting answers. In *People v Bulger, supra*, 462 Mich 495, the Michigan Supreme Court held that the Constitution does not require appointed counsel in these circumstances, and in the present case the Court of Appeals held that the Constitution does require appointed counsel.

In *Ross v Moffitt*, *supra*, 417 US at 612, 616 this Court described the framework for analyzing whether an indigent criminal defendant has a constitutional right to appellate counsel:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system. The State cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all, by virtue of his indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal. The question is not one of absolutes, but one of degrees.
>
> * * *
>
> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. (Citations and internal quotation marks omitted.)

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary. Because this distinction is based on legitimate and permissible differences between trials and guilty pleas the Michigan appellate system is "free of unreasoned

distinctions." Furthermore, because of protections built into the guilty plea system, indigent guilty-pleading defendants "have an adequate opportunity to present their claims fairly" and receive a "meaningful appeal" without appointed appellate counsel.

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Pleas.

Convictions based on guilty pleas are advantageous to both defendants and the State, and are a major aspect of the criminal justice system. *Brady v United States*, 397 US 742, 752 (1970) (describing advantages and noting that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty"). In *Tollett v Henderson*, 411 US 258, 267 (1973) this Court discussed the *Brady* trilogy of guilty plea cases (*Brady*, *McMann v Richardson*, 397 US 759 (1970), and *Parker v North Carolina*, 397 US 790 (1970)) and recognized unique aspects of guilty pleas:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

In Michigan, extensive protections are in place to assure that guilty pleas are voluntary, intelligent, and accurate. MCR 6.302; App 146a-149a. The purpose of these elaborate guilty plea procedures is to make sure the record reflects "'that the defendant was informed of such constitutional rights and incidents of a trial as reasonably to warrant the conclusion that

he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents.'" *People v Saffold*, 465 Mich 268, 271; 631 NW2d 320 (Mich 2001) quoting *In re Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (Mich 1975). The court rule specifically requires that the trial court "speak[] directly to the defendant," the prosecutor, and the defendant's attorney to assure that the defendant is fully informed and fully understands that by pleading guilty he is giving up many rights, specifically including the right to appeal and the right to appointed counsel on any discretionary appeal. MCR 6.302(B)(5), (6); App. 147a.

In *People v Bulger, supra*, 462 Mich at 517, where the Michigan Supreme Court upheld the constitutionality of the practice of denying counsel in discretionary first appeals from guilty pleas, the Court quoted from *Tollett v Henderson*, noted the State's "fundamental interest in the finality of guilty pleas," *Hill v Lockhart*, 474 US 52, 58 (1985), and then listed many rights that a guilty-pleading defendant gives up:

> Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. See 1A Gillespie, Michigan Criminal Law and Procedure (2d ed), § 16:30, pp 94-104 (discussing the effect of a plea on the availability of various appellate claims). n7 These are all reasoned distinctions that are relevant to determining whether Michigan

> provides "meaningful access" to the appellate courts.
>
> ----------Footnotes----------
>
> n7 By pleading guilty or nolo contendere, a defendant waives the following issues: search and seizure claims, defective complaint and warrant claims, claims of error as to the preliminary examination (including sufficiency of the proofs to bind over), Fifth Amendment claims, nonjurisdictional evidentiary issues, challenges to operating a vehicle while under influence of alcohol predicate offenses, claims (including constitutional claims) relating to the defendant's factual guilt and the prosecution's ability to prove the case, claims of error in juvenile waiver proceedings, speedy trial claims (if the plea is unconditional), claims of violation of the statutory 180-day rule, claims of speedy trial under MCL 768.1; MSA 28.1024, claims of failure to timely file the habitual [offender] information, statute of limitations claims, unpreserved entrapment claims, double jeopardy claims that are unpreserved so that the necessary facts to support the claim are missing, and ineffective assistance of counsel claims in which the underlying issues are waived by a guilty plea. Gillespie, Michigan Criminal Law & Procedure, Practice Deskbook (2d ed), § 10:50, pp 10-15 to 10-17.
>
> ----------End Footnotes----------

Michigan's prohibition against the appointment of appellate attorneys for indigent defendants is not absolute and many issues not waived by the plea will fall within one of the exceptions. MCL 770.3a(2); App. 140a. The statute provides that appellate counsel shall be appointed whenever a defendant seeks leave to appeal a conditional plea. A conditional plea is

allowed by MCR 6.301(C)(2) and preserves for appeal pretrial rulings specified by the defendant at the time of the plea. The statute also provides that an attorney must be appointed if the prosecutor initiates an appeal, if the defendant's application for leave to appeal is granted, and if the trial court exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

These distinctions between trials and guilty pleas are legitimate and permissible, and support Michigan's decision to treat the appeals differently. The Court of Appeals made little attempt to evaluate these distinctions, merely noting that guilty pleas are not "infallible." This is an improper basis on which to base a determination of unconstitutionality. *Smith v Robbins*, 528 US 259, 277, fn 8 (2000)("Of course, no procedure can eliminate all risk of error."). Instead of relying on the Michigan Supreme Court's statement of issues that are waived by a guilty plea, the Court of Appeals incorrectly relied upon the dissenting opinion in *Bulger* for the proposition that some "legally complex" issues can still be appealed. App. 27a. This too is not a sufficient basis to hold the statute unconstitutional. *Ross v Moffitt, supra*, 417 US at 616:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

B. Defendants Who Plead Guilty Have an Adequate Opportunity to Present Their Claims Fairly and Receive A Meaningful Appeal.

In reaching the conclusion that a defendant is not entitled to appointed counsel in a discretionary appeal to the State Supreme Court after an appeal of right to the State intermediate appellate court, this Court in *Ross v Moffitt, supra*, 417 US at 615, noted the nature of the materials the defendant would typically have available:

> At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se*, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

In discretionary first appeals from guilty plea convictions in Michigan, unless there has been an interlocutory appeal the defendant does not have an appellate brief written by a lawyer or an appellate opinion. However, the defendant will have substantial materials available that are sufficient to permit him to present his claims fairly and thus receive a meaningful appeal.

It is the responsibility of appointed trial counsel to file appropriate interlocutory appeals and to respond to any preconviction appeals by the prosecutor. MCR 6.005(H)(2)-(3); App. 143a-144a. As noted by the Michigan Supreme

Court in *Bulger*, 462 Mich at 518-519, Michigan law requires that to preserve an issue for appeal, the defendant must move to withdraw the plea before the trial court, and trial counsel is required to file such motions: "Thus, our court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation." Furthermore, it is the responsibility of trial counsel to file any appropriate postconviction motions. Motions filed in Michigan courts must be in writing and be accompanied by a brief. MCR 2.119(A). While MCR 2.119 is a civil rule, it nevertheless applies in criminal proceedings. See MCR 6.001(D). An indigent defendant is entitled to free copies of court documents, including transcripts. MCR 6.433. The District Court also noted that Respondents Tesmer and Schnell both had the benefit of a detailed 38-page appellate brief--obviously prepared by an attorney and circulated to "many indigent defendants"--addressing the constitutionality of the practice of denying appointed appellate counsel. App. 105a.

Thus, an indigent defendant who has entered a plea and wishes to appeal will not approach the Michigan Court of Appeals empty-handed. He will have a transcript; a motion and brief filed by a lawyer in the trial court that identifies the alleged legal issues and outlines the applicable law; and he will have the trial court's opinion regarding that motion, either in writing or in a transcript of an oral opinion. An indigent appellant will therefore be in a position similar to that of the indigent appellant in *Ross v Moffitt, supra.* He will have a transcript, a brief, and a court opinion upon which he can base any appeal. These, together with the "nontechnical and easily understood" form produced by the State Court Administrative Office (App. 157a) as required by the statute, permit appellants without counsel to present their claims in a "lawyerlike fashion" as contemplated by *Ross v Moffitt*, 417 US at 615.

Contrary to the express language of these court rules and statements by the Michigan Supreme Court, the Court of Appeals below erroneously relied on statements by Respondents and disparaged these requirements. App. 27a.

Michigan has chosen to address the burdens on its appellate court system, in part, by imposing limits on appeals from guilty pleas. It may constitutionally do so since its process still provides "adequate and effective appellate review to indigent defendants." *Griffin v Illinois,* 351 US 12, 20 (1956)(plurality opinion holding unconstitutional a State requirement that indigents pay a fee for a transcript necessary to appeal). A State "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin,* 351 US at 24 (opinion of Justice Frankfurter, concurring in judgment). States are laboratories of federalism that are free, within the limits of the Constitution, to experiment with procedures for handling criminal appeals, *Smith v Robbins*, 528 US 259, 276 (2000)("We will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems'"-(citation omitted.)).

The system Michigan has chosen for appeals from guilty pleas complies with the Constitution. This Court should grant certiorari and reverse the Court of Appeals.

II. Whether Attorneys Have Third-Party Standing To Make A Constitutional Challenge To A State Statute Prohibiting Appointment Of Appellate Counsel For Indigents In Discretionary First Appeals Following Guilty Plea Convictions Is An Important Federal Question That The Court Of Appeals Decided In A Way That Is Contrary To This Court's Decisions

The Court of Appeals below should not even have considered the constitutionality of MCL 770.3a because none of the Respondents are proper parties to bring the challenge. Relying on *Younger v Harris*, 401 US 37 (1971), the Court of Appeals correctly concluded that "the district court should have abstained from hearing the claims of all three indigent plaintiffs" because ongoing proceedings in Michigan State courts gave the indigent Respondents adequate opportunity to bring their constitutional claims. App. 6a-10a. Nevertheless, and despite the fact that the Respondent Attorneys did not represent any of the named indigent Respondents, the Court of Appeals incorrectly granted third-party standing to the Attorneys to assert the rights of potential future indigent defendants. App. 10a-19a.

Four Judges dissented, App. 35a:

> Permitting lawyers in their own right to raise the same claims that *Younger* teaches cannot be brought by their clients undermines the very deference to state court processes required by *Younger*. Time-honored prudential rules against third-party standing do not generally permit lawyers as parties to litigate the interests of their clients, and exceptions to the third-party standing rule should not be expanded to provide a tool to circumvent the policies underlying *Younger*.

A. Respondent Attorneys Have, At Most, Standing to Bring Only their Own Claims.

In *Warth v Seldin*, 422 US 490 (1976), this Court considered the standing of various groups of petitioners to challenge a zoning ordinance that allegedly excluded low-income persons, and described constitutional and prudential limitations on the doctrine of standing, 422 US at 499:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper--and properly limited--role of the courts in a democratic society. (Citation omitted.)

Because the standing issue was raised in a motion to dismiss, the Attorneys' claim that the statute will adversely affect their incomes must be taken as true, *Warth v Seldin*, 422 US at 501. Even so, those claims are speculative, uncertain, and merely allege an indirect potential consequence of the statute. They are not sufficient to allege "'such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth*, 422 US at 498-499, quoting *Baker v Carr*, 369 US 186, 204 (1962).

Respondent Attorneys' claim is simply that they are on rosters of attorneys who on occasion receive court appointments to represent criminal appellants and that there may be fewer of those appointments in the future. They do not allege that they have any contractual or other right to any

specific number of appointments. The Respondent Attorneys have failed to "allege specific, concrete facts demonstrating that the challenged practices harm [them], and that [they] personally would benefit in a tangible way from the court's intervention." *Warth*, 422 US at 507. They do not allege any violation of any "personal right under the constitution," *Warth* 422 US at 509; nor could they, because attorneys have no constitutional right to receive court appointments to represent indigents on appeal.

B. Respondent Attorneys Do Not Have Third-Party Standing because they have not suffered sufficient injury in fact, they do not have a sufficiently close relation to future indigent defendants, and there are no significant obstacles to the future defendants bringing their own claims.

Even if the claims of the Respondent Attorneys were arguably sufficient to establish a "case or controversy" under US Const, Art III to assert their own rights, they are not sufficient to permit the Attorneys to assert the rights of others. *Warth*, 422 US at 499 (1976), noted this prudential limitation on the exercise of judicial power: "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

In *Powers v Ohio*, 499 US 400, 410-411 (1991) this Court held that a white defendant was entitled to challenge the composition of his jury, from which black persons had been excluded, and described the circumstances in which the general prohibition against permitting a litigant to raise claims of third parties can be overcome:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests. (Citations omitted.)

The Court of Appeals below said that the Respondent Attorneys had suffered an injury in fact because they "stand to lose income if the challenged statute remains if force," they had a close relation to indigent defendants, and "significant obstacles of indigency and procedural processes challenge the indigents in contesting the statue." App. 11a-12a, 19a. The Court was wrong on all three factors.

As noted, the allegation that the Attorneys might lose potential income if they receive fewer appellate appointments in the future as a result of the statute is not sufficient to confer standing on them, so they have not suffered an "injury in fact," and do not have a "sufficiently concrete interest" in the outcome of the issue in dispute. They do not have any constitutional rights at stake.

Nor do the Respondent Attorneys have a sufficiently "close relation" to as-yet-unknown future potential clients. In *Caplin & Drysdale, Chartered v United States*, 491 US 617 (1989) a law firm was given third-party standing to challenge a drug forfeiture statute on behalf of its existing client because it had a $170,000 stake in the outcome of the question and in *United States Department of Labor v Triplett*, 494 US 715 (1990) an attorney was permitted to litigate the constitutionality of attorney limitations on behalf of his existing clients because the provision was enforced against the attorney directly and

affected a relationship to which the client was constitutionally entitled. The relation of Respondent Attorneys to future potential clients is far more ephemeral, however, and is more akin to the situation in *Warth v Seldin, supra*, 422 US at 509-510 (taxpayers of one jurisdiction held not entitled to challenge another jurisdiction's zoning ordinance because they were not subject to it and there was no relationship existing between them and others whose rights were assertedly violated). Mere "incidental congruity of interest" is insufficient to permit third-party standing. *Warth*, 422 US at 510.

Finally, in the present case there is no "hindrance to the [future indigent defendants'] ability to protect [their] own interests." The Court of Appeals' conclusion that indigent defendants face "significant obstacles of indigency and procedural processes" is based on circular, self-fulfilling reasoning and on that Court's belief that indigent defendants would not succeed in their own challenges. App. 12a-19a.

The Court of Appeals' statements that "almost every layperson would need the help of counsel to present an appeal" and "an indigent would have difficulty pursuing the right counsel as a *pro se* plaintiff" (App. 13a) show that instead of properly determining standing it was prejudging the merits of the issue of entitlement to appointed counsel. This Court cautioned against such bootstrapping in *Warth*, 422 US at 500: "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ." Ironically, although the Court of Appeals used this improper analysis in deciding the third-party standing issue, it correctly disavowed the same analysis when deciding whether to abstain from the indigent defendants' claims, App. 9a: "Whether [Respondent Carter] had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim."

Even if the Court of Appeals is correct that an indigent defendant would be unlikely to prevail in a direct appeal in the Michigan courts, in a 42 USC § 1983 lawsuit, or in a federal habeas corpus lawsuit, that fact has no bearing on the issue of whether there are barriers to presenting the claims.

The dissenting opinion below cogently noted that if the Court of Appeals is correct that these attorneys have third-party standing to assert the constitutional claims of unknown potential future clients, it is difficult to perceive a principled reason to deny standing in other situations like workers' compensation, Social Security, and tort reform, App. 45a-46a: "It would be a short step from the majority's grant of third-party standing in this case to a holding that lawyers generally have standing to bring in court the claims of future unascertained clients."

In summary, the Respondent Attorneys have, at most, standing to assert only their own claims of loss of income, and those claims do not demonstrate any constitutional violation. This case presents none of the factors necessary to give them third-party standing to raise constitutional claims of unknown potential future indigent defendants. To the contrary, this is a case where the cautionary words of Justice Powell, writing for himself and three other Justices, concurring in part and dissenting in part in *Singleton v Wulff*, 428 US 106, 129 (1976) are particularly pertinent:

> It seems wholly inappropriate, as a matter of judicial self-governance, for a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services.

CONCLUSION

For these reasons, Petitioner State court judges ask this court to grant certiorari and reverse the judgment of the Court of Appeals that the Respondent Attorneys have third-party standing, that indigent criminal defendants convicted on guilty pleas have a constitutional right to appointed appellate counsel in a discretionary first appeal, and that MCL 770.3a violates the Constitution.

Respectfully submitted,

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Dated: September, 2003

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 00-1824/1845

JOHN CLIFFORD TESMER; CHARLES CARTER; and ALOIS SCHNELL, on behalf of all similarly situated individuals; ARTHUR M. FITZGERALD; and MICHAEL D. VOGLER, Plaintiffs-Appellees,

v.

JENNIFER M. GRANHOLM, Attorney General, Defendant, JUDGE JOHN F. KOWALSKI; JUDGE WILLIAM A. CRANE; and JUDGE LYNDA L. HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, Defendants-Appellants (00-1824),

JUDGE DENNIS C. KOLENDA, Appellant (00-1845).

333 F.3d 683
December 11, 2002, Argued
June 17, 2003, Decided
June 17, 2003, Filed

JUDGES: Before: MARTIN, Chief Circuit Judge; BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges. MARTIN, C. J., delivered the opinion of the court, in which BOGGS, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. ROGERS, J., delivered a separate opinion concurring in part and dissenting in part, in which SILER, BATCHELDER, and GIBBONS, JJ., joined. NORRIS,

J., delivered a separate dissenting opinion, in which SILER, BATCHELDER, and GIBBONS, JJ., joined. **[*686]**

BOYCE F. MARTIN, JR., Chief Circuit Judge. In 1994, Michigan's voters passed an amendment to the Michigan constitution precluding criminal defendants who plead guilty, guilty but mentally ill, or nolo contendre from receiving an appeal of right. Rather, these defendants may appeal only by leave of the Michigan Court of Appeals. Several Michigan state judges began to deny appointed appellate counsel to indigent defendants who pled guilty or nolo contendre, a practice that the state legislature codified. Three indigent defendants who were denied appointed appellate counsel brought an action in the Eastern District of Michigan under *42 U.S.C. Section 1983*, alleging that the practice and the statute violated the *Due Process* and *Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution*. The group of plaintiffs also included two attorneys who accept appointments in criminal proceedings. The defendants in this action were three Michigan circuit court judges who had denied the indigent plaintiffs appointed appellate counsel and the state attorney general.

After a hearing on motions, the district court found that the plaintiff attorneys had third-party standing and that the court should abstain from hearing indigent Tesmer's claims. The court further declared the challenged statute and practice unconstitutional, but issued no separate judgment or decree. After defendant Judge Lynda Heathscott and non-party Judge Dennis Kolenda refused to appoint appellate counsel for non-party indigents, plaintiffs sought injunctive relief and class certification. The district court entered an injunction against Heathscott and Kolenda, denied certification of a class of judge-defendants, and bound all Michigan state judges to the injunction.

We dismissed an earlier appeal by defendants after their notice of appeal misidentified the March 31 opinion and order.

We denied the subsequent petition for rehearing on the ground that the district court's order was not a final judgment. The defendants again appealed after issuance of the injunction, and a panel of this court heard the appeal. A majority of judges of this court elected to rehear the appeal en banc. We now AFFIRM the district court in part and REVERSE in part, holding that *Younger* abstention applies to the indigents but that the attorney-plaintiffs have third-party standing. We agree that the statute and practice are unconstitutional, but we hold that the injunction was improper with respect to Judge Kolenda and all non-party Michigan state judges.

I. BACKGROUND

In 1994, Michigan voters amended the state constitution to eliminate appeals as of right for criminal defendants who plead guilty, guilty but mentally ill or nolo contendre. n1 **[*687]** Mich. Const. Art I, § 20. Such defendants must file petitions for appeal, and the Michigan Court of Appeals may grant leave to appeal after review of the petitions.

n1 For simplicity, we will refer only to guilty pleas, though our analysis will apply to pleas of guilty but mentally ill and nolo contendre, as contained in the statute.

Several state judges began to deny appointed appellate counsel to those indigents who pled guilty. Judges John F. Kowalski, William A. Crane, and Lynda Heathscott denied appointed appellate counsel to indigent plaintiffs John C. Tesmer, Charles Carter, and Alois Schnell after these plaintiffs pled guilty in criminal proceedings.

The practice was later codified by Michigan's legislature in 2000. The statute provides that those who plead guilty generally "shall not have appellate counsel appointed for review of the defendant's conviction or sentence." *Mich. Comp. Laws Ann. § 770.3a(1).*

The statute provides exceptions to this general prohibition. The court *must* appoint counsel to aid in review of the conviction or sentence when one of four situations occurs: 1) the prosecution seeks appeal, 2) the sentence exceeds the upper end of the guidelines range, 3) the defendant's petition for appeal is granted, or 4) the defendant has entered a conditional plea. *Mich. Comp. Laws. § 770.3a(2).*

The court also has the discretion to appoint counsel if three situations all occur related to sentencing: 1) the defendant alleges that the sentence was based on improper scoring of the offense or prior record, 2) the defendant objected to the scoring or preserved the matter for appeal, and 3) the sentence was an upward departure from the upper limit of the range that the defendant alleges should have been scored. *Mich. Comp. Laws Ann. § 770.3a(3).*

The effect of the statute is that most indigent defendants who plead guilty will be denied appointed counsel when applying for leave to appeal. Only very limited circumstances will require appointed counsel to help with a petition for appeal.

Together with two attorneys who accept appointments as criminal defense counsel, Arthur M. Fitzgerald and Michael D. Vogler, the indigents brought an action on March 20, 2000, against the three judges and the state attorney general in federal district court under *42 U.S.C. § 1983*. The state attorney general was later found to be an improper party and is not part of this appeal. The indigents alleged that both the statute and practice of denying appointed appellate counsel after guilty pleas violated their *Fourteenth Amendment* rights to Due Process and Equal Protection. The attorney-plaintiffs allege that the statute violated their rights by denying them the opportunity to represent indigents in seeking leave to appeal. The plaintiffs sought declaratory relief, as well as permanent and preliminary injunctions.

The district court on March 31, 2000, issued an order and opinion after a hearing, finding that the attorney-plaintiffs had third-party standing to represent the rights of indigents and that the indigents had standing. *Tesmer v. Granholm, 114 F. Supp. 2d 603 (E.D. Mich. 2000)*. The court decided to abstain from hearing Tesmer's claim because of a pending state court action involving Tesmer. The court ultimately granted declaratory relief, ruling that the statute and practice were both unconstitutional under the *Equal Protection* and *Due Process Clauses*. The court would not impose an injunction against the judges, reasoning that *Section 1983* forbids injunctive relief against judges for acts or **[*688]** omissions in their judicial capacity, unless they violated a declaratory decree or declaratory relief was unavailable.

The judges appealed on April 10, 2000, under a case numbered 00-1405. A panel of this court, however, dismissed the appeal on July 13. The judges had mistakenly based their appeal upon the issuance of a final decree, which we ruled was not actually a final judgment ripe for appeal.

Meanwhile, on May 9, after Judge Heathscott denied appellate counsel to a non-party indigent defendant and after non-party state Judge Kolenda had denied appointed appellate counsel in several cases, the plaintiffs moved for injunctive relief against those two judicial defendants. The district court enjoined Judges Heathscott and Kolenda from denying appointed counsel. *Tesmer v. Kowalski, 114 F. Supp. 2d 622, 629 (E.D. Mich. 2000)*. Expanding this injunction, however, the district court held that the earlier ruling that the statute and practice were unconstitutional bound all Michigan state judges. Though plaintiffs had requested certification of a class of judges similarly situated to the named defendants, the district court denied certification and simply expanded the reach of its injunction.

The three named judges in the initial suit and Judge Kolenda appealed from the June 30 order. A panel of this court

held that abstention barred review of any of the named indigents' claims and that the attorneys had third-party standing. It reversed the district court and held that the denial of appointed appellate counsel did not violate the United States Constitution.

We granted rehearing en banc. We agree with the district court that the attorney-plaintiffs have third-party standing but hold that none of the indigents' claims may be heard under abstention principles. We also uphold the district court in finding that denial of appointed appellate counsel following guilty pleas is unconstitutional. Finally, we hold that the district court could not enjoin Judge Kolenda or all Michigan state judges who were non-parties to the suit.

II. ANALYSIS

The judges argue that the district court should have abstained because ongoing proceedings in Michigan state courts gave the indigent plaintiffs adequate opportunity to bring their constitutional claims. They also urge us to hold that the attorney-plaintiffs did not have third-party standing.

Abstention

In *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, the Supreme Court advised federal courts to abstain from deciding a matter that would be properly before them but for the pendency of state criminal proceedings in the matter. *Id. at 43-45*. Such deference to state proceedings is essential to the doctrine of "Our Federalism." *Id. at 44*. In a companion case, the Court held that the rule in *Younger*, which applies to an action seeking injunctive relief, applies as well to prohibit an action seeking declaratory relief when a state criminal prosecution is pending. *Samuels v. Mackell, 401 U.S. 66, 73, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971)*.

We look at three factors to determine if *Younger* abstention is warranted: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding, (2) whether the proceedings implicate important state interests, and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *Tindall v. Wayne County Friend of the Court, 269 F.3d 533, 538 (6th Cir. 2001)*; *see also Cooper v. Parrish,* **[*689]** *203 F.3d 937, 954 (6th Cir. 2000)*; *Zalman v. Armstrong, 802 F.2d 199, 201-02 (6th Cir. 1986)*. We review the district court decision regarding abstention de novo. *Tindall, 269 F.3d at 538.*

First, when determining if state court proceedings involving the plaintiffs are pending, we look to see if the state court proceeding was pending at the time the federal complaint was filed. *Zalman, 802 F.2d at 204*. It remains pending until a litigant has exhausted his state appellate remedies. *Huffman v. Pursue, Ltd., 420 U.S. 592, 609, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975)*; *Foster v. Kassulke, 898 F.2d 1144, 1146 (6th Cir. 1990)*. Finally, if state habeas corpus relief is available, a claim may be considered pending in state court for the purpose of analyzing abstention. *Foster, 898 F.2d at 1146.*

The parties agree that abstention applies only to the indigent plaintiffs and not to the attorney-plaintiffs. Tesmer pled guilty to a home invasion charge, then requested appellate counsel to assist in preparing an application for leave to appeal, a request denied on September 7, 1999. The district court abstained from adjudicating Tesmer's claim because he was a party to a pending state court action, had an adequate opportunity to raise constitutional challenges in the state court proceeding, and no extraordinary circumstances justified interference in the state court proceedings. Appellees do not challenge this decision.

Carter is also party to a proceeding in state court, but the district court found abstention inappropriate as to him because

he lacked the opportunity to bring a constitutional challenge, the third factor.

Finally, the district court found that Schnell had no pending state action, as his application for leave to appeal and request for rehearing were denied. Under Michigan's procedural rules, Schnell had fifty-six days to file a delayed application for leave to appeal with the Michigan Supreme Court. The district court found that Schnell's state action was completed at the time the federal complaint was filed, so abstention was not warranted as to him.

We disagree. Our holding in *Foster* allows abstention where a litigant has abandoned pursuit of state court relief. *898 F.2d at 1146*. In *Foster*, the plaintiff filed a *Section 1983* complaint challenging both a Kentucky statute that limited the amount of compensation her appointed counsel could receive and the practice of not providing a trial transcript. *Id. at 1145*. When she filed her federal suit, her claims had been denied in state court. We said, however, that she could pursue claims on direct appeal and, if unsuccessful, could resort to state habeas relief. *Id. at 1146-47*. By seeking injunctive relief in a *Section 1983* action, she was attempting to obtain federal review of state procedures in a criminal case before the state court could decide them fully. *Id.* Similarly, in *Huffman*, the plaintiff chose not to appeal an adverse trial outcome and filed suit in federal court. *420 U.S. at 598*. The plaintiff argued that abstention should not apply because the state proceedings had ended. *Id. at 608*. The Court disagreed, stating that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Id.* Schnell's failure to pursue his claim by filing a delayed application for leave to appeal in the Michigan Supreme Court or by filing a state habeas corpus action equates to a failure to exhaust state court remedies.

Thus, we conclude that each of the indigent plaintiffs had ongoing state court proceedings at the time the federal complaint in this action was filed. We turn next to the third

factor, whether plaintiffs had an **[*690]** adequate opportunity to raise constitutional claims in state court.

A federal plaintiff arguing that he had an inadequate opportunity to raise constitutional claims in state court "has the burden to show that state procedural law barred presentation of [its] claims." *Armco, Inc. v. USW, AFL-CIO, Local 169, 280 F.3d 669, 682 (6th Cir. 2002)* (alteration in original). If the plaintiff had an opportunity to present his federal claim in state court proceedings, a federal court should not exercise jurisdiction over the claim. *Moore v. Sims, 442 U.S. 415, 425, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979)*. On the other hand, if authority clearly shows that state law barred the presentation of the constitutional claims in state court, abstention is not appropriate. *Id. at 425-26*; *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987)*.

We agree with the district court's finding that Tesmer had an adequate opportunity to present his federal claims in state court because he filed a "lawyerly brief" seeking a delayed application for leave to appeal. The district court found that Carter did not have an adequate opportunity because he had no attorney and no knowledge of law. We disagree, for if Tesmer could raise the claim, Carter could also present his claims. Whether he had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim. Furthermore, a state supreme court case that was ongoing during this appeal constituted an example of the opportunity to raise the constitutional issues in a state proceeding. *See People v. Bulger, 462 Mich. 495, 614 N.W.2d 103 (Mich. 2000), cert. denied, 531 U.S. 994 (2000)*. In that case, an indigent defendant appealed from the denial of his motion for appointed appellate counsel following a guilty plea for cocaine and marijuana possession. *Id. at 105-06*. During the pendency of *Bulger*, the statute in question here was enacted; thus, it did not apply to defendant Bulger. The Michigan

Supreme Court expressly stated that it was not considering the constitutionality of the statute. *Id. at 107*. After finding no authority, either state or federal, mandating appointment of counsel following a guilty plea and finding that indigents do have meaningful access to appeals, the court remanded to the trial court so that Bulger could pursue an application for leave to appeal his convictions. *Id. at 114-15*.

Our conclusion that the district court should have abstained does not foreclose any appeal by the indigents. Once state proceedings are concluded, a litigant may choose to pursue a constitutional claim in a federal forum, and the federal court may choose to exercise jurisdiction. *See Huffman, 420 U.S. at 606*. Finally, as the district court did with respect to Tesmer, we consider whether extraordinary circumstances would allow federal jurisdiction despite the strong case for abstention. We analyze the circumstances of all three indigent plaintiffs together, however, because of the similarity of their situations.

In *Younger* the Court stated that federal interference with state proceedings may be allowed where irreparable injury is "great and immediate;" where state law flagrantly and patently violates express constitutional prohibitions; or where parties make a showing of bad faith, harassment, or unusual circumstances that require equitable relief to remedy. *401 U.S. at 46, 53-54*. The district court concluded, as do we, that plaintiffs did not demonstrate any such extraordinary circumstances.

[*691] We conclude that the district court should have abstained from hearing the claims of all three indigent plaintiffs, and we reverse its decision that only Tesmer's claims warranted abstention.

Third-Party Standing

The state judges contend that the two attorney-plaintiffs do not have standing to raise the constitutional challenge to the

statute because they are asserting the rights of third parties and have not suffered an injury in fact. The attorney-plaintiffs alleged in their complaint that they receive income when they accept appointments as appellate counsel for criminal defendants and that the statute will reduce the number of cases in which they would receive such appointments, thus reducing the income they receive.

The district court found that the doctrine of *jus tertii,* or third-party standing, applies to the attorney-plaintiffs. We agree.

Ordinarily a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1976)*. The Court, however, has allowed the rule to be disregarded when plaintiffs meet certain requirements, articulating the requirements in *Powers v. Ohio, 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991)*. In allowing a criminal defendant to bring suit on behalf of black citizens who had been struck from a jury, the Court permitted a litigant to bring suit on behalf of a third party if 1) the litigant has stated an injury in fact, 2) the litigant has a close relation to the third party, and 3) the third party's ability to assert his own interests is hindered. *Id. at 410-11*.

The Court's analysis in *Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*, guides our conclusion. In *Singleton*, two physicians challenged restrictions on government funding for abortions performed on patients eligible for Medicaid. The Court found that the physicians had stated an injury when they alleged that they would receive payments from the state for performing these abortions if the relief they sought were granted. *428 U.S. at 113*. A plurality explained that the second condition is met when "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" and when the litigant "is fully, or very nearly, as effective a proponent of the right as the

latter." *Id. at 114-15*. As to the third condition, the Court did not demand that asserting a right be impossible for a third party but that a "genuine obstacle" to assertion exist. *Id. at 116*. Then, "the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Id.*

Applying these tests to the facts before us, we agree with the district court's analysis of third-party standing. The attorney-plaintiffs, like the physicians in *Singleton*, stand to lose income if the challenged statute remains in force. This constitutes an actual injury. The relationship between indigent defendants who seek appointed appellate counsel and attorneys whose appellate representation is denied is a close one . Judge Rogers's dissent in this case questions neither the existence of actual injury nor the closeness of the relationship between indigent defendants and appellate counsel. Rather, he would deny standing to the attorney-plaintiffs based on the third prong of the *Powers* requirements, that of significant obstacles to bringing suit to enforce one's own rights.

[*692] In *Singleton*, the Court recognized that a suit brought by the women was not an impossibility; for example, the pregnant women could file suit under pseudonyms to protect privacy. *428 U.S. at 117*; *see also id. at 116 n.6* (discussing potential routes around obstacles in earlier third-party standing cases). The Court, however, reasoned that third-party standing is permissible even where a prospective litigant may be able to bring suit, because a genuine obstacle is all that is necessary satisfy the third prong of the *Powers* requirements. *Id. at 116*. Yet, the dissent seeks to stretch this third prong from a showing of a hindrance to asserting one's own rights to a requirement of impossibility, a stretch the Court disavowed in *Singleton*.

Federal courts have permitted third-party standing frequently in the context of racially suspect peremptory

challenges during jury selection, identifying as obstacles the procedural burdens prospective jurors face of having no chance to be heard at their exclusion or no real ability to obtain declaratory or injunctive relief at that time, as well as the practical burdens of economic costs and small financial gain. *See e.g. Powers, 499 U.S. at 410-11*; *United States v. Ovalle, 136 F.3d 1092, 1102 (6th Cir. 1998)*. Privacy and anonymity concerns have also been noted as hindrances to individuals enforcing their rights. *Singleton, 428 U.S. at 116*; *Pa. Psychiatric Soc. v. Green Spring Health Servs., Inc., 280 F.3d 278, 290 (3d Cir. 2002)* (discussing stigma that could deter mental health patients from pursuing litigation). While stigma is an unlikely hindrance to an indigent defendant asserting his right to counsel after pleading guilty, economic and procedural burdens are obstacles for convicted indigents.

An indigent seeking appointed counsel does not have the economic means to pursue a lawsuit to enforce his rights or appeal the denial of them. As the Court has noted, almost every layperson would need the help of counsel to present an appeal. *Evitts v. Lucey, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*. Indeed, in the similar state case upon which the dissent relies to show that an indigent was able to assert his rights, the indigent had appointed counsel. *Bulger, 614 N.W.2d at 105*. For reasons unstated, the Michigan Supreme Court, after electing not to assert superintending control over Bulger's appeal on the merits, granted Bulger time to move for appointed appellate counsel. *Id.* The Michigan Supreme Court ordered the trial court to appoint counsel to argue the motion for appointed appellate counsel; thus, appointed counsel for this issue represented Bulger throughout his unsuccessful attempt to obtain appointed appellate counsel. *Id.* The Michigan Supreme Court apparently recognized that an indigent would have difficulty pursuing the right to counsel as a *pro se* plaintiff. The dissent speculates that the indigents would have no difficulty obtaining a lawyer to represent them, primarily evidenced by its unsupported assumption that if the

attorney-plaintiffs have the wherewithal to bring suit as parties, they ought to be just as willing to represent the indigents.

An indigent defendant also faces procedural burdens, confronting a situation in which assertion of the right to counsel would be effectively precluded by events transpiring between his plea and the first time he could pursue the matter in federal court. Following a guilty plea, a defendant could move, as Bulger did, for appointment of counsel to prepare an application for leave to appeal. *See 614 N.W.2d at 105*. The defendant would lose in this proceeding, for Michigan will be bound by its precedent. The indigent would be unable to assert his right **[*693]** to appointed counsel in federal court because of, as the dissent correctly notes, abstention doctrines. Upon reaching the conclusion of his unassisted attempts to appeal on the merits, the indigent would then be unable to bring a constitutional challenge to lack of appointed counsel in federal court that would gain him relief in the form of appointed appellate counsel. As we recently held in *Dotson v. Wilkinson, 329 F.3d 463, 2003 U.S. App. LEXIS 9555 (2003)*, a prisoner could raise a *Section 1983* claim to vindicate due process rights if the suit "does not *necessarily* implicate the invalidity of his continued confinement." While *Dotson* involved parole procedures, we drew upon *Heck v. Humphrey, 512 U.S. 477, 487, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994)*, for its holding that in a *Section 1983* suit alleging unlawful investigation and arrest, Heck was actually testing the legality of his conviction despite seeking only damages. *Dotson, 2000 U.S. App. LEXIS 9555 at *8* (citing *Heck, 512 U.S. at 481-82*). Many courts would find that a *Section 1983* action alleging that denial of appointed appellate counsel violated rights would similarly be a test of the underlying conviction. In such a situation, the indigent would have to pursue a petition for habeas corpus, including a claim that the lack of appointed counsel prejudiced him, but only after exhausting state remedies. *See 28 U.S.C. § 2254(b), (c)*. Though an indigent could pursue a petition for habeas corpus on a ground such as involuntariness of his plea

and perhaps invalidate his conviction as a result, the likelihood he could ever obtain similar relief in a successful petition asserting his right to appointed appellate counsel is virtually impossible. Even respecting principles of comity and federalism, we find that an indigent defendant would likely be foreclosed from any meaningful challenge to the lack of appointed counsel to prepare an application for leave to appeal.

The Supreme Court has, on at least two occasions, held that attorneys have third-party standing to assert constitutional rights of clients when a right to representation by counsel was affected by government action. *United States v. Triplett, 494 U.S. 715, 720-21, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990); Caplin & Drysdale Chartered v. United States, 491 U.S. 617, 623, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 - 624 n.3, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989)*. In *Triplett*, the Court found third-party standing where Department of Labor regulations imposed restrictions on attorney's fees in black lung benefit cases, allowing an attorney to invoke the rights of black lung claimants because the fee restriction deprived prospective clients of the right to obtain legal representation. *494 U.S. at 720*. The Court observed that it has found third-party standing when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship, to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Id.* Though this restriction was against the litigant, the Court did not limit its holding to this alignment of parties. *See id.* Here, the statute does not restrict the attorneys or the indigents, but takes away the indigents' entitlement to appointed counsel, effectively placing the restriction on the state by prohibiting it from providing counsel in certain cases.

In *Caplin & Drysdale*, the Court held that a law firm had third-party standing to challenge a criminal forfeiture statute that required its criminal client to relinquish all his assets,

leaving nothing for payment of legal fees. *491 U.S. at 624 n.3.* The law firm contested the constitutionality of the statute as infringing upon **[*694]** defendants' *Sixth Amendment* right to counsel of choice. *Id.* The dissent notes that the client in *Caplin & Drysdale* forfeited his property to obtain a plea agreement, and the plea-bargaining pressure to forgo the defense attorney's fee claims by relinquishing assets, according to the dissent, constitutes an obstacle of the type contemplated by *Powers*. The indigents here faced the plea-bargaining process, and part of that process is informing them of the state's prohibition on appointed appellate counsel as a consequence. If facing the choice of relinquishing assets to enter into a plea bargain or going to trial is an obstacle, then too is the similar choice of giving up appointed counsel as a result of a plea.

The dissent cites three cases in which courts refused to grant third-party standing to attorneys. In the first, *Conn v. Gabbert, 526 U.S. 286, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999)*, an attorney representing a witness in the well-known murder trial of the Menendez brothers was searched by police for a letter sent from one brother to his client. *Id. at 288.* At the same time, the witness was called to testify before the grand jury without the attorney present, because he was being searched. *Id. at 289.* The attorney brought suit under *Section 1983* to enforce his own right to practice law, and further argued the timing of the search interfered with his client's right to have him available for consultation. *Id. at 292.* The Court declined to address whether his client had such a right, declaring he had no standing to enforce it; however, the Court did not discuss any of the factors required to obtain standing in making its conclusion. *Id. at 292-93.*

Illustrating its point that attorneys should not have third-party standing to challenge any statute that could affect their livelihood, the dissent refers to *Alexander v. Whitman, 114 F.3d 1392, 1408-09 (3d Cir. 1997)*, for its holding that a law

firm had no standing to challenge a statute forbidding wrongful death actions on behalf of stillborn fetuses. The suit arose when Alexander had a stillborn child and wished to bring a wrongful death action against the hospital and medical personnel, but was barred by the statute. *Id. at 1396-97.* Alexander brought her own challenge, in which the attorneys asserted their claims. The Third Circuit stated it was unaware of a constitutional right allowing the attorneys to sue "under the circumstances involved here" and affirmed the district court's conclusion that the mother was best suited to challenge the statute. *Id. at 1409.* In questioning the law firm's challenge to the denial of standing, the court preceded that observation by commenting that "whatever loss" the lawyers would suffer "is reduced to such insignificance (if not absurdity) by Ms. Alexander's tragic loss." *Id. at 1410.* The Third Circuit did not apply the facts of the case to the requirements articulated in Supreme Court standing precedent, appearing to dismiss the third-party claim as a meaningless extreme.

The third case is *Lambert v. Turner, 525 F.2d 1101 (6th Cir. 1975)* (per curiam), in which we rejected third-party standing for a legal services attorney to bring suit on behalf of all legal services attorneys against a state juvenile court judge for an injunction to prohibit the judge from failing to enforce rights of indigents to counsel and from retaliating against defendants represented by legal services. *Id. at 1102.* Our affirmance of the district court's decision, however, rested partly upon the fact that the parties entered into a consent injunction, thus eliminating any case or controversy between the parties. *Id.* Furthermore, the suit had named not one juvenile involved in an active case before the **[*695]** judge and sought to vindicate the rights of "potential juvenile clients." *Id.*

The prohibition against third-party standing would, in Judge Rogers's view, apply strongly where legal service providers wish to require procedures that increase demand for

their services. The "paradigm case" he mentions, however, is a hypothetical situation the Court used to illustrate how, under the Administrative Procedure Act, *5 U.S.C. Section 702*, a party seeking judicial review of a federal agency action must establish that his injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the basis of his complaint." *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)*. In the Court's hypothetical, a legal transcription company would not be "adversely affected within the meaning" of a statute requiring an agency to conduct "on the record" hearings, because the statute was enacted to protect parties to the hearings. *Id.* The *Lujan* case involved not a constitutional right like access to counsel, but a complaint by an environmental group against the Department of the Interior and Bureau of Land Management for violations of environmental and public land management statutes in decisions to reclassify public lands or return them to public domain, thus opening the lands up to mining. *Id. at 879.* The example used happens to be a legal services provider, but bears little relation to the ultimate issue here, the ability of indigent criminal defendants to assert a constitutional right to counsel.

Inmate access to the legal system is an important right, one that has been recognized in cases enforcing the ability of prisoners to have access to law libraries and legal assistance. *See Lewis v. Casey, 518 U.S. 343, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)*; *Wilson v. Iowa, 636 F.2d 1166, 1167 (8th Cir. 1981)* (stating that inmates acting as "jailhouse lawyers" have standing to contest official action that prevents them from assisting fellow inmates). In *Lewis*, the Court wrote: "When any inmate . . . shows that an actionable claim of [challenge to sentences or conditions of confinement] which he desired to bring has been lost or rejected, or that presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided," that inmate can show the state did not furnish adequate access to law libraries or legal

assistance. *518 U.S. at 356.* In citing these cases, we point to the significance attached to the ability of inmates to pursue actionable claims, and reason that if pursuit of actionable claims is an important right of inmates, but a burden prevents such pursuit, then surely the burden qualifies as the type of hindrance significant enough to satisfy the third prong of the *Powers* test.

In their brief, the indigents and attorney-plaintiffs cite numerous cases to support their abstention argument in which federal district courts have rejected abstention where controlling state authority "makes submitting those same constitutional issues to a state forum futile." *W.P. v. Poritz, 931 F. Supp. 1187, 1195 (D.N.J. 1996)*; *see also McKinstry v. Genesee County Circuit Judges, 669 F. Supp. 801, 806-07 (E.D. Mich. 1987)*. While these district courts asserted jurisdiction by rejecting abstention, we believe the rationale behind their decision is pertinent to the third-party standing issue here. Asserting the constitutional issue here in Michigan's courts would appear to be a similarly futile exercise for the indigent, which does not decrease in difficulty once he or she exhausts state relief. We hold that significant obstacles of indigency and procedural processes challenge the indigents in contesting **[*696]** the statute, thus satisfying the third prong in analyzing third-party standing for the attorney-plaintiffs.

Constitutionality of the Statute

A defendant who pleads guilty in Michigan state court must now seek leave for appeal from the state court of appeals, rather than having an appeal of right, as we have in the federal system. Under most circumstances, the Michigan statute at issue operates to deny indigent defendants appointed counsel to assist in the preparation of petitions for appeal.

The United States Supreme Court has expanded the right to counsel to allow appointed appellate counsel in certain circumstances. The judge-appellants are correct in stating that

the Supreme Court has never held that a constitutional right to appointed counsel exists on all first appeals. The Court has yet to address the situation the statute presents, that of a discretionary first appeal. In addressing the issue of the right to appointed appellate counsel, the Court has ruled on first appeals as of right and second, discretionary appeals, but not the discretionary first appeal at issue here. We are left to fill in this gap.

In *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)*, the Court held that a California rule of criminal procedure was unconstitutional. The California rule mandated appellate court review of the trial record to see whether appointment of appellate counsel would be helpful to the court or to the indigent defendant making the request. The Court, without stating that it was specifically relying on due process or equal protection, reasoned that defendants who could afford counsel would have the advantage of briefs and argument prepared and delivered by counsel. *Id. at 356*. On the other hand,

> unless the printed pages show that an injustice has been committed, [indigent defendants are] forced to go without a champion on appeal. Any real chance [indigent defendants] may have had of showing that [the] appeal has hidden merit is deprived . . .when the court decides on an ex parte examination of the record that the assistance of counsel is not required.

Id. (emphasis omitted) To the Supreme Court, this procedure constituted impermissible discrimination against indigent defendants. *Id.* The Supreme Court held that if the state elected to create a system of appeals, a right to counsel exists for first-tier appeals as of right. *Id.* The Supreme Court expressly declined to address denial of counsel to assist an indigent in

> preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike.

Id. at 356 (emphasis omitted).

The Michigan judges here emphasize both that *Douglas* is limited to first appeals of right and that the language in the *Douglas* opinion places abstract limits on the need for equality. "[A] state can, consistently with the *Fourteenth Amendment*, provide for differences [in appellate procedure] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them." *Id. at 356-57* (citations omitted). The Michigan judges argue that this language supports their position that due process and equal protection do not require **[*697]** appointed appellate counsel in the present situation.

The Supreme Court further explained in *Douglas*, however, that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id. at 357* (emphasis omitted). It described the differences between an appeal of right in which a defendant who can afford counsel retains a lawyer and one in which an indigent is unrepresented. "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Id. at 358.*

Another case considering the right to appointed counsel on appeal is *Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974)*. The judge-appellants assert that the holding in

Ross is controlling, as it addressed discretionary appeals. The criminal appellant in *Ross* was denied appointed counsel for a discretionary appeal to the North Carolina Supreme Court after the state court of appeals affirmed his trial conviction. *Id. at 603-04*. The Court held that the United States Constitution did not require appointment of counsel to assist in discretionary second-level appeals. *Id. at 610*.

Discussing its decision under a due process analysis, the Court reasoned that the role of an attorney is different in trial. There the attorney acts as a shield to protect a person presumed innocent. In appellate proceedings, the role is of "a sword to upset the prior determination of guilt." *Id. at 610-11*. The Court stated that the existence of an appeal process does not require a state to provide counsel in every stage to be fair but cannot single out indigents and deny them "meaningful access to the appellate system because of their poverty." *Id. at 611*.

The disparate treatment of indigents, stated the Court, is more appropriately discussed under an equal protection analysis. The requirements of equal protection do not require exact equality, but do require that the appellate system be "free of unreasoned distinctions" and "that indigents have an adequate opportunity to present their claims fairly within the adversary system." *Id. at 611-12* (citations omitted). The Court held that the *Equal Protection Clause* would not require the state to appoint counsel for discretionary second level appeals. *Id. at 612*.

Much of the Court's position, however, stems from the fact that North Carolina allowed an appeal of *right* to the state supreme court in cases involving a sentence of death or life imprisonment and to the state court of appeals in all other criminal cases. *See id. at 613*. North Carolina authorized appointment of counsel for this first appeal of right. *Id. at 614*. Thus, in petitioning for a discretionary appeal in North Carolina, a defendant has already had his claims presented by a lawyer and rejected by an intermediate appellate court. *Id.* He

will then have materials such as trial transcripts, a brief on appeal, and often an appellate opinion. *Id at 614-15*. An appellate court weighing a discretionary petition for second appeal would have sufficient material to provide a basis for a decision to grant or deny an appeal. *Id. at 615*.

The Court also emphasized the purpose of the discretionary nature of the second appeal in *Ross*. The Court reasoned that higher appellate courts take cases of significant public interest, of major jurisprudential significance, or to resolve conflicts **[*698]** between their decisions and those of lower courts. *Id.* The higher appellate courts will have sufficient material to determine if this second-level, discretionary appeal is one they should consider and may deny the appeal even if the intermediate court erred, because the case does not fulfill a function they serve by reviewing significant cases. *Id. at 615*.

The dissent in *Ross* agreed with the Fourth Circuit's decision in the case, declaring that a right to appointed counsel attached in discretionary appeals. *Ross, 417 U.S. at 619* (Douglas, J., dissenting.) The Fourth Circuit had found "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." *Id.* (citation omitted). The dissent argued that the Fourth Circuit was correct in noting that an indigent defendant proceeding without counsel is at a substantial disadvantage compared to a wealthier defendant who may hire counsel "when he is forced to fend for himself in seeking discretionary review from the State Supreme Court or from [the United States Supreme] Court." *Id. at 620*.

We have once before held that states may not deny appointment of counsel to assist indigent defendants in preparing applications for discretionary direct appeal to the state's highest court. *Mitchell v. Johnson, 488 F.2d 349, 349 (6th Cir. 1973)*. Our decision was made before the Supreme Court ruled contrarily in *Ross v. Moffitt*. The reasoning, however, is instructive. There we looked at the Supreme

Court's decision in *Douglas v. California*, as well as two other Supreme Court cases dealing with rights of indigents to assistance on appeal. In the first, *Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956)*, the Supreme Court ruled that an appellate review procedure that in effect required defendants to have access to a trial transcript would comport with due process and equal protection only if indigents were provided with a free transcript. Four of the justices stated, *at 19*,

> To deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate [an] appellate review as defendants who have money enough to buy transcripts.

Similarly, the Court held in *Burns v. Ohio, 360 U.S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164, 84 Ohio Law Abs. 570 (1959)*, that a state could not require an indigent to pay a filing fee as a condition to filing for leave to appeal to the state supreme court. The Court reasoned, *at 257*, that:

> Once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of the.. poverty. . . . This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.

These cases point to a concern that no one be precluded from pursuing the avenues of appeal simply because one cannot afford the pursuit. That rationale was stated in *Mitchell:*

> Defendants without education in the law or experience in its practice cannot be expected, unaided, to state accurately and clearly whatever claims for justice their cases might possess. . . . We think it not unreasonable to postulate **[*699]** that discretionary review will be denied indigents in a significant number of cases where wealthier appellants, with the assistance of counsel, would have obtained review and possibly a reversal of the conviction on the merits.

488 F.2d at 351. With only two significant Supreme Court cases that expressly address the right to appointed appellate counsel, the parties urge us to consider the right to such counsel as deduced from several habeas corpus cases that concern effective assistance of counsel. In *Evitts v. Lucey, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*, the Court held that defendants were entitled to effective assistance of counsel on a first appeal of right. "To prosecute the appeal, a criminal appellant must face an adversary proceeding that--like a trial--is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.* The Court stressed that an appellate brief on the merits of the appeal, a trial transcript, and a lower court opinion are important in appellate cases.

In *Pennsylvania v. Finley, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987)*, a habeas corpus case that dealt with appointed counsel in the context of effective assistance, the Court reversed a Pennsylvania Superior Court's ruling that *Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967)*, controlled the conduct of appointed counsel in collateral post-conviction proceedings. *Finley, 481 U.S. at 554*. Though *Anders* was based on the underlying right to appointed counsel in the first appeal of right, the Court held it applied

only when the criminal defendant has established the right to counsel. *Finley, at 554.* In *Finley*, the criminal defendant *was* afforded appointed counsel in her first direct appeal, which happened to be as of right, *id. at 553*, but the Court determined she had no right to counsel in post-conviction proceedings and her appointed counsel need not have followed *Anders* when assisting with her collateral attack. *Id. at 558*. The judge-appellants urge us to consider this case to bolster their argument that appointed appellate counsel is required only in an appeal of right. We give little weight to their use of *Finley*, however, because it addresses the right to appointed appellate counsel only by repeating the principles stated in *Douglas* and *Ross*.

The Court found that the distinction between *Douglas* and *Ross* was significant in deciding *United States v. MacCollom, 426 U.S. 317, 324, 48 L. Ed. 2d 666, 96 S. Ct. 2086 (1975)* (plurality opinion), in which an indigent prisoner sought a free trial transcript to help him prepare a collateral attack under *28 U.S.C. § 2255*. The indigent had an opportunity for a direct appeal as of right. He failed to pursue it, which would have allowed him to receive the free trial transcript. *Id. at 325*. Thus he could not, years later, seek a free transcript for a collateral attack, which the Court characterized as "a delayed duplicate of a right of appeal with attendant free transcript which it offered in the first instance . . . ." *Id. at 325-26*. MacCollom had already been given "an adequate opportunity to present his claims fairly . . . ," which is all *Ross* required. *Id. at 324* (quoting *Ross, 417 U.S. at 616*).

The indigents and attorney-appellees in the present appeal urge us to consider the Court's discussion in *Smith v. Robbins, 528 U.S. 259, 276-78, 145 L. Ed. 2d 756, 120 S. Ct. 746 (2000)*, of previous cases setting forth rights of indigents pursuing appellate review. *Smith* involved the constitutionality of a California procedure that allowed counsel to withdraw when faced with the possibility of pursuing a frivolous appeal.

Id. The Court reiterated that the **[*700]** guarantees of the *Equal Protection* and *Due Process Clauses* combine to require that a state's appellate process provides indigents adequate opportunity to present claims, but did not make a distinction between appeals of right and discretionary appeals. *Id.*

We cannot read into this discussion any mandate from the Court for states to provide appellate counsel in every instance. What we can take from the discussion is that appellate processes must be fair and may not be implemented in a manner that discriminates based on indigency. The judge-appellants argue that the manner in which the process for appeal has been implemented in Michigan does not discriminate based on income or deny fair opportunities to indigents.

The judge-appellants emphasize the distinction between convictions following trials and convictions based on pleas. The Court declared in *Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985)* (quoting *United States v. Timmreck, 441 U.S. 780, 784, 60 L. Ed. 2d 634, 99 S. Ct. 2085 (1979)*), that the state has a fundamental interest in the finality of the prosecution following entry of a plea. The Michigan judges argue that judges must follow statutory procedures to ensure that a defendant's rights are protected when he chooses to enter a plea and that he makes the plea knowingly, voluntarily, and truthfully. This is not an infallible procedure, though. An appellate court may find error, as we frequently find in appeals from guilty pleas in federal district courts. Under Michigan law, a plea of guilty or nolo contendre waives issues that could have been raised on appeal, such as search and seizure claims or *Fifth Amendment* claims. M.C.R. 6.311(C). A guilty plea does not foreclose a defendant from raising other issues, such as double jeopardy claims or jurisdictional claims. These issues, we note, are legally complex to a layperson. *Bulger, 614 N.W.2d at 138* (Cavanaugh, J., dissenting).

The argument that a guilty plea bars defendants from raising some issues and that the plea process protects rights also would not apply to defendants who hope to raise discrepancies in sentencing. While limited exceptions allow for the courts to appoint appellate counsel following a guilty plea, such as when courts have imposed sentences that exceed the upper limit of the guideline range, these exceptions are infrequent. Conditional pleas are not regularly entered, and a defendant who was sentenced within the limits for a mandatory minimum sentence will have no absolute right to appointed counsel to prepare an application to appeal.

Finally, the judge-appellants argue that indigents who plead guilty have an adequate opportunity to preserve issues for appeal and present challenges through post-conviction trial court motions that appointed trial attorneys file. The indigents and attorney-plaintiffs noted that these motions, however, are not the same as an appeal to the next highest court, but are usually of the type seeking withdrawal of appointed trial counsel, a new trial, or a rehearing.

Review of criminal procedures in other states indicates that few states require an application or petition for leave to appeal for the first appeal from a conviction, whether plea-based or verdict-based. *See Bundy v. Wilson, 815 F.2d 125, 136-142 (1st Cir. 1987)* (collecting all state statutes pertinent to right to appeal). Of the other states that mandate a petition or request for appeal from criminal proceedings, being New Hampshire, Virginia, and West Virginia, none regulate appointment of appellate counsel in the manner prescribed by **[*701]** Michigan law. n2

> n2 In New Hampshire, a defendant convicted of a class A misdemeanor has a right to appeal to the superior court from a conviction in municipal or district court. *N.H. Rev. Stat. Ann. § 599.1* The state supreme court may decline to accept an appeal from a lower court. N.H. R. of Ct. 7. The New Hampshire constitution guarantees

counsel to assist defendants who will have liberty deprived, N.H. Const. Pt. I, art. 15, but in cases where liberty is not at stake, neither trial counsel nor appellate counsel need be appointed. *State v. Westover, 140 N.H. 375, 666 A.2d 1344, 1347 (N.H. 1995).*

In Virginia, appeals to the court of appeals or supreme court are discretionary, except for appeals of capital convictions. *Dodson v. Dep't of Corrections, 233 Va. 303, 355 S.E.2d 573, 576 n.5, 3 Va. Law Rep. 2403 (Va. 1987). Virginia Code § 19.2-157* provides that an indigent is entitled to appointed appellate counsel. *Id. at 309, 355 S.E.2d at 577.*

In West Virginia, the state constitution establishes initial appeal by petition. *Billotti v. Dodrill, 183 W. Va. 48, 394 S.E.2d 32, 37-38 (W.Va. 1990).* The West Virginia Supreme Court determined that an indigent must be allowed appointed counsel to assist on appeal. *Id. at 39*; *Rhodes v. Leverette, 239 S.E.2d 136, 139 (W.Va. 1977).*

Michigan's statute creates unequal access even to the first part of the appellate system. Though the judge-appellants argue that any distinctions in Michigan's appellate system stem from the fact the indigent pleads guilty, or that the appeal is merely discretionary, the effect is to create a different opportunity for access to the appellate system based upon indigency. As applied, the statute violates the due process provision of the *Fourteenth Amendment to the United States Constitution*, and is thus unconstitutional.

Reach of the Injunction

After issuing its opinion in the first case, the district court then crafted an injunction that not only bound parties to the original action, but also parties in the second action, Judge Kolenda, and other non-parties.

On appeal, the standard of review for the grant of an injunction is abuse of discretion. *United States v. Miami Univ., 294 F.3d 797, 806 (6th Cir. 2002)*. "A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law." *Id.* (quoting *Herman Miller, Inc. v. Palazzetti Imports & Exports, 270 F.3d 298, 308 (6th Cir. 2001))*.

Under *Section 1983*, injunctive relief cannot be granted against a judicial officer "unless a declaratory decree was violated or declaratory relief was unavailable." Following the March 30, 2000, hearing, the district court issued an opinion declaring the statute and the practice unconstitutional.

Under the declaratory judgment statute, *28 U.S.C. § 2201(a)*, a court "may declare the rights and other legal relations of any interested party seeking such declaration." Declaratory judgment is effective as to only the plaintiffs who obtained it. *Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975)*. When a class has not been certified, the only interests of concern are those of the named plaintiffs. *McKenzie v. Chicago, 118 F.3d 552, 555 (7th Cir. 1997)*. The Court of Appeals for the Seventh Circuit explained, "A wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified." *Id.* The Court of Appeals for the Third Circuit has ruled that a declaratory judgment finding a state statute unconstitutional is binding only upon parties named in the action. *YWCA of Princeton v. Kugler, 463 F.2d 203, 204 (3rd Cir. 1972)*. We have already determined that abstention principles keep federal **[*702]** courts from ruling upon the cases of the indigent plaintiffs so only the attorneys would be protected by the declaration as named plaintiffs. A different attorney, neither Fitzgerald nor Vogler, seeking court appointment to handle a defendant's application for appeal, or a future indigent defendant, has not had his or her interests declared under the district court's order. Thus, under *Doran* and authority from

sister circuits, we hold that the declaration and injunction applies only insofar as it states the rights of the named attorney-plaintiffs.

The district court stated that it was exercising its authority to issue an injunction against the judges under *Federal Rule of Civil Procedure 65(d)*. The rule provides:

> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

To prevail on a motion for preliminary injunction, a plaintiff must show the following elements: 1) likelihood of success on the merits, 2) irreparable injury, 3) degree of harm an injunction would cause to others, and 4) that the public interest would be served. *Doran, 422 U.S. at 931*; *Local Union 1937 v. Norfolk S. Corp., 927 F.2d 900, 904 (6th Cir. 1991)*. To receive final injunctive relief, a plaintiff must prevail on the merits of the claim, show irreparable injury, and show that he has no adequate remedy at law, and the court must consider the effect on the public good. *Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982)*.

A lack of irreparable injury must end the court's inquiry. *Aluminum Workers Int'l Union v. Consol. Aluminum Corp., 696 F.2d 437, 444 (6th Cir. 1982)*. The record does not show whether the district court found irreparable injury, and the district court did not address it in either of its two opinions. The judge-appellants argue that none of the plaintiffs can show irreparable injury. They point out that the indigent criminal defendants were not subject to the statute, nor do they have

pending charges that will subject them to the statute. The attorneys are a different case. The judge-appellants allege that the attorneys will suffer only transitory harm by being denied appointments, and that no evidence shows the attorneys would even receive future appointments. The attorneys argue, however, that without injunctive relief it is entirely likely that this aspect of their practice, however small or large in volume, would be eliminated. The attorneys would be forced to challenge each denial of appointment.

Our deepest concern with the equitable relief fashioned by the district court is that it enjoins non-party judicial officers. During the June 30, 2000, hearing, the district court expressed concern with the propriety of enjoining all Michigan circuit court judges, and rightly so. We have often reiterated the principle that injunctive relief should be no broader than necessary to remedy the harm at issue. *See, e.g., Miami Univ., 294 F.3d at 816 (6th Cir. 2002).* In *Blackard v. Memphis Area Medical Center for Women, Inc., 262 F.3d 568 (6th Cir. 2001)*, we explained that *Federal Rule of Civil Procedure 65(d)* is based on the doctrine that "a decree of injunction not only binds the parties defendant but also those represented by them or subject to their control." *Id. at 574* **[*703]** (quoting *Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14, 89 L. Ed. 661, 65 S. Ct. 478 (1945)).*

To determine whether a person is in active concert or participation with an enjoined party, we look to the actual relationship between the two. *Id.* Control of a third party by the enjoined party is not a requirement for the third party to be bound. *Id.* The third party is bound "if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it or subject to its control." *Id.* In this case, the judges named in the original suit, who would be bound by an injunction issued for violating the decree, are not in control of or in privity with the other state judges, including Judge Kolenda. The only way in which these judges could

conceivably be identified in interest is that they all happen to be judges and have sworn to uphold Michigan law. We think this to be a far broader application of the concept of "active concert and participation" than permissible under the district court's authority.

Enjoining a judge is a serious matter. As we stated in *Panhandle Eastern Pipe Line Co. v. Thornton, 267 F.2d 459, 460 (6th Cir. 1959)* (citations omitted), an injunction against a judge is a "drastic and extraordinary remedy" that is "reserved for really extraordinary causes." As a sister circuit asked, in adopting the reasoning of a former dissenter: "When we embark on this new course, we must prepare to face this unpleasant question: If a state judge does not obey a district court's injunction, are we willing to jail the state judge for contempt?" *Pompey v. Broward County, 95 F.3d 1543, 1550 (11th Cir. 1996)* (quoting *Luckey v. Harris, 896 F.2d 479, 482 (11th Cir. 1989)* (Edmonson, J., dissenting)). In some circumstances, enjoining a judge is necessary to ensure full relief to the parties. *In re Justices of the Supreme Court, 695 F.2d 17, 23 (1st Cir. 1982).* For example, in *WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981),* we upheld a district court's injunction against a state judge who had issued an unconstitutional media suppression order.

Engaging in unconstitutional practices or following an unconstitutional statute are circumstances that may warrant injunctive relief. The injunctive relief cannot be unlimited, however, and must comport with established rules of civil procedure. Even the district court recognized that it was treading on uncertain ground, indicating that it was "mindful that the issue of whether an injunction can issue with respect to those judicial officers not parties to the prior declaratory decree is not clear cut." *114 F. Supp. 2d at 628.* After parsing the language of *Section 1983*, the court concluded that the specification of "a" declaratory decree, rather than expressly requiring one for each judicial officer, indicates a

congressional intent to allow one declaratory decree to apply to multiple enjoinees. *Id.* The court added that this interpretation promotes conservation of judicial resources by not requiring plaintiffs to file suit each time a judge acts contrarily to the decree.

The district court commented that the scarcity of cases addressing the issues set forth in the indigents' and attorney-plaintiffs' motion for an injunction suggests that the overwhelming majority of judges do abide by federal court orders that are designed to enforce the United States Constitution. *Id. at 629.* "Indeed, it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *In re Justices of Supreme Court, 695 F.2d at 23.* Failure of a judge unnamed in a declaratory decree to abide by such declaration does not allow a district court to throw caution to the wind and summarily **[*704]** bind all judges. The court must still follow the statutes, rules, and case law governing the issuance of injunctions. We hold that with respect to Judge Kolenda, a non-party to the original suit, and to the unnamed and uncertified putative class of Michigan judges, the injunction cannot issue.

A further defect with the injunction is that no separate document was entered for the decree or injunction. *Rule 58 of the Federal Rules of Civil Procedure* requires that "every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in *Rule 79(a)*." *Federal Rule of Civil procedure 79(a)* governs the procedures the clerk must use when entering judgments. In *Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 55 L. Ed. 2d 357, 98 S. Ct. 1117, reh'g denied, 436 U.S. 915, 56 L. Ed. 2d 416, 98 S. Ct. 2259 (1978)*, the Supreme Court explained the existence of *Rule 58* as a necessity to provide a means to determine deadlines to appeal. Though the rule is to be applied mechanically to determine whether an appeal is

timely, it should not foreclose appellate jurisdiction and may be waived where district courts show intent that the opinion and order be the final judgment, judgment is entered in the docket, and parties do not object to the lack of a separate judgment. *Id. at 387.* We have held that the lack of a separate document under *Rule 58* divests us of jurisdiction to hear an appeal. *See, e.g., Communications Workers of Am. v. United Tel. Co., 491 F.2d 207 (6th Cir. 1974).* The outcome of these cases required remand to the district court for entry of a separate judgment, and then a new appeal. *See id.* Other circuits have held that the failure to enter a *Rule 58* judgment, if a district court's decision is unquestionably final, does not prohibit appellate review. *See e.g. Kunkel v. Cont'l Cas. Co., 866 F.2d 1269, 1272 n.3 (10th Cir. 1989)* (citations omitted). We agree with the view of the Supreme Court and other circuits and hold that remand to the district court, after we have heard the merits of the case twice, would contravene judicial economy and require duplicative litigation. Therefore, we simply REVERSE the issuance of the injunction against Judge Kolenda and all Michigan judges who were not parties to the original suit.

III. CONCLUSION

In conclusion, we AFFIRM the district court's ruling that it must abstain from hearing Tesmer's claims, that the attorneys have third-party-standing, and that the Michigan statute is unconstitutional. We REVERSE the district court's ruling that it may hear the claims of Schnell and Carter, and that it may issue an injunction against Judge Kolenda and non-party Michigan judges.

ROGERS, Circuit Judge, concurring in part and dissenting in part. With great respect, I feel bound to dissent on the ground that the lawyer plaintiffs in this case lack standing. I concur in that portion of the majority opinion holding that under the principles of *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, and its progeny, the district

court was required to abstain with respect to the claims brought by the state criminal defendants. Permitting lawyers in their own right to raise the same claims that *Younger* teaches cannot be brought by their clients undermines the very deference to state court processes required by *Younger*. **[*705]** Time-honored prudential rules against third-party standing do not generally permit lawyers as parties to litigate the interests of their clients, and exceptions to the third-party standing rule should not be expanded to provide a tool to circumvent the policies underlying *Younger*.

I. The General Prudential Rule Against Third-Party Standing

Numerous Supreme Court holdings support the unexceptional conclusion that a litigant must assert his legal rights or interests and cannot rely on the legal rights or interests of others not party to the proceedings. In *Warth v. Seldin*, for instance, the Court stated the general rule that

> even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations closely related to Art. III concerns but essentially matters of judicial self-governance the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

422 U.S. 490, 499-500, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (citations omitted); *see also Powers v. Ohio, 499 U.S. 400, 410, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991)*; *United States*

Dep't. of Labor v. Triplett, 494 U.S. 715, 720, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990); *Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 954, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)*; *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 474, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982)*; *Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)*; *Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953)*.

The *Warth* case involved a challenge to ordinance provisions of the township of Penfield that allegedly kept low-income persons from moving to Penfield, contrary to the requirements of the *Fourteenth Amendment*. *Warth, 422 U.S. at 493*. Several classes of plaintiffs failed to show sufficiently that they would benefit from winning the suit, and thus lacked *Article III* standing. *Id. at 502-08, 514-17*. Two classes of plaintiffs, however, were held to lack standing even though they could or might be able to show *Article III* injury. Taxpayers of nearby Rochester claimed that their tax burden would be increased by Penfield's refusal to share in the housing of poor people, and thus had *Article III* standing. *422 U.S. at 508-09*. The Court nonetheless found they lacked prudential standing since the *Fourteenth Amendment* basis for the Rochester taxpayers' suit, assuming the claim had validity, protected poor people who wanted to live in Penfield, but not taxpayers of neighboring jurisdictions. *Id. at 509-10*. Since the legal foundation of the lawsuit did not protect the interests of the Rochester taxpayers, those taxpayers lacked standing. *Id.*

A second class of *Warth* plaintiffs, current residents of Penfield, also had a potentially sufficient interest to meet *Article III* standing requirements--the interest in living in a diverse community. *422 U.S. at 512, 514*. But these plaintiffs lacked prudential standing because, again, the basis for the lawsuit--the *14th Amendment*--did not protect such an interest. *Id. at 514*. The Court contrasted **[*706]** the situation

presented in *Warth* with cases that arose under Civil Rights statutes that did protect such interests. *Id.*

The *Warth* holdings reflect a long-recognized principle. In *Tileston v. Ullman, 318 U.S. 44, 87 L. Ed. 603, 63 S. Ct. 493 (1943)*, the Supreme Court held that doctor plaintiffs lacked standing to challenge a Connecticut statute forbidding their counseling the use of contraceptives, where the sole interest asserted was the patients' right to life under the *Fourteenth Amendment. Id. at 46.* It should be noted that the Supreme Court in its analysis did not purport to engage in a balancing of interests. Instead, it relied upon a general rule that plaintiffs must litigate their own interests, and that they lack standing to litigate the interests of others. *Id.*

Warth's holding with respect to third party standing is still good law, and was applied recently by the Supreme Court to a case involving a lawyer seeking as a party to litigate his client's interest. *Conn v. Gabbert, 526 U.S. 286, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999).* In *Conn*, the Court rejected third party standing for an attorney who brought suit in his own right against a prosecutor for actions that interfered with the asserted right of his client, a grand jury witness, to have her lawyer available for consultation outside the grand jury room. *526 U.S. at 292-93.*

The third party standing prohibition would appear to apply most strongly where a provider of legal services seeks to require procedures that will increase the demand for the provider's services. Thus in the context of judicial review of administrative action (where prudential standing rules are, if anything, more loosely applied n1), the Supreme Court has used *as a paradigm case* the example of a transcript preparer who would lack standing to challenge an agency's refusal to require its hearings to be on the record as required by statute. *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); see also NCUA v. First Nat'l &*

Trust Co., 522 U.S. 479, 498, 140 L. Ed. 2d 1, 118 S. Ct. 927 (1998).

> n1 Although the present appeal is not an *Administrative Procedure Act (APA)* case, because there is no federal administrative action being reviewed, any indication in an APA case that prudential standing requirements are *not met* would apply *a fortiori* to standing outside of the APA context. This is because the Supreme Court has held (however mysteriously as a matter of textual analysis) that the APA expanded the class of "aggrieved" persons entitled to judicial review. *Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970). See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)* ("We have long since rejected [the] interpretation . . . which would have made the judicial review provision of the APA no more than a restatement of pre-existing law. Rather we have said that to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint.").

Plaintiff lawyers in this case are injured by a state rule that, if unconstitutional, is unconstitutional because it infringes on the interests of their unnamed future clients. Application of the general rule requires the conclusion that they lack standing. Moreover, the policies of the general rule apply squarely. Permitting the lawyers to sue would permit the federal courts to "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary **[*707]** to protect individual rights." *Warth, 422 U.S. at 500.*

Congress may of course lift the prudential rule, permitting categories of persons with *Article III* standing to litigate the interests of others. *See, e.g., Bennett v. Spear, 520 U.S. 154, 162-66, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997)*; *FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77, 84 L. Ed. 869, 60 S. Ct. 693 (1940)*. No such statutory lifting of prudential standing requirements has been asserted in this case.

II. Exceptions to the General Rule

To be sure, the Court has found exceptions to the prudential rule. First, where an enforcement action is brought directly against a defendant under a law or practice that the defendant argues is an invalid infringement of someone else's rights, the Court has engaged in a balancing determination to determine whether third-party standing should be permitted. In rejecting third-party standing for the Rochester taxpayers in *Warth*, the Supreme Court explicitly distinguished this category of cases:

> In several cases, this Court has allowed standing to litigate the rights of third parties when *enforcement of the challenged restriction against the litigant* would result indirectly in the violation of third parties' rights. *See, e.g., Doe v. Bolton, 410 U.S. 179, 188, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)*; *Griswold v. Connecticut, 381 U.S. 479, 481, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965)*; *Barrows v. Jackson, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953)*. But the taxpayer-petitioners are not themselves subject to Penfield's zoning practices.

422 U.S. at 510 (emphasis added). This exception explains several of the cases relied upon by the majority to support third-party standing in this case, including *Powers v. Ohio, supra. Powers* involved a criminal defendant challenging *his conviction* by asserting the rights of a third party. *499 U.S. at*

410. See also Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) (same); *Caplin & Drysdale v. United States, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (989)* (criminal forfeiture of assets claimed by plaintiff lawyers); *Dep't of Labor v. Triplett, 494 U.S. 715, 108 L. Ed. 2d 701, 110 S. Ct. 1428* (state disciplinary action against lawyer for accepting legal fees not permitted by federal regulation). n2 Similarly, where a plaintiff **[*708]** sues to enjoin such enforcement by criminal or regulatory authorities *against the plaintiff*, the court is more likely to find third-party standing. *See, e.g., Craig v. Boren, 429 U.S. 190, 192-97, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976)* (vendor's challenge to enforcement of statutory prohibition *against vendor* of sale of 3.2% beer to males between 18 and 21 years of age); *Doe v. Bolton, 410 U.S. 179, 188, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)*. n3

n2 *Triplett*, relied upon by plaintiffs to support third-party standing in this case, is not only distinguishable because it was a direct enforcement against the party invoking the rights of others, but also because it involved United States Supreme Court direct review of a state high court judgment (in that case West Virginia). While the Supreme Court did not go so far as to hold that third-party standing limits are totally irrelevant in that context, *see 494 U.S. at 721* n. **, it is nonetheless apparent that standing requirements may be less strictly enforced when the Supreme Court is reviewing a state court case than when it is ruling on standing in the lower federal courts. "Federal justiciability requirements, whether dictated by *Article III* or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and its special role and are therefore irrelevant to the question of what more generous justiciability rules a state may adopt if it chooses to do so." 1 Laurence Tribe, American Constitutional Law 320-21 (3d ed.

2000) (footnotes omitted). A leading constitutional law casebook states:

> Standing, mootness, and ripeness rules apply both to constitutional litigation arising in the federal courts, and to Supreme Court review of constitutional decisions of state courts. The rules are sometimes different, however, depending on whether the Supreme Court is reviewing a state or federal court decision. One traditional explanation for the difference is that case or controversy limitations represent, in part, rules of self-limitation for the federal courts and as such are irrelevant to Supreme Court review of state decisions.

William Cohen & Jonathan Varat, Constitutional Law 110 (10th ed. 1997). It follows that a expansive holding regarding prudential standing on review of a state high court, as in *Triplett*, does not necessarily control cases brought in the lower federal courts.

n3 Another case relied upon by the majority in this case, *Singleton v. Wulff, 428 U.S. 106, 113-18, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*, does not require an expansion of this exception. *Singleton* involved a challenge to Medicaid rules that limited reimbursement for the performance of abortions. A plurality of four Justices upheld third-party standing on the part of the doctor-plaintiffs challenging the Medicaid rules, and the opinion is arguably inconsistent with limiting third-party standing to direct enforcement situations. *428 U.S. at 113-18*. Four Justices dissented vigorously in that case, however, on just that ground. *Id. at 127-31* (Powell, J., dissenting). Justice Stevens' fifth vote was based on his finding that the doctors were litigating their own constitutional rights, and thus Justice Stevens took no

position on the direct-vs.-indirect criterion for third-party standing in the presence of such a finding. *Id. at 121-22. Singleton* is thus not controlling on that issue, and the Supreme Court's reliance on the distinction in *Warth* remains good law.

Second, when litigation already has a plaintiff with standing, the presence of other injured parties does not undermine the purposes of the limitation on third-party standing, and has sometimes been allowed. In *Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)*, for example, the Court reasoned that when there was at least one individual plaintiff who demonstrated standing to assert his own rights, it was unnecessary for the Court to decide if the circumstances justified departure from the general prudential rule against third-party standing and proceeded to the merits of the case. *Id. at 263-64. See also Doe v. Bolton, 410 U.S. at 188.*

Finally, the Supreme Court has explicitly found third-party standing requirements to be more liberally applied in *First Amendment* cases. *See, e.g., Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)* n4; *L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 38, 145 L. Ed. 2d 451, 120 S. Ct. 483 (1999)*; *Eisenstadt, 405 U.S. at 445 n.5*; *Thornhill v. Alabama, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 60 S. Ct. 736 (1940)*. This relaxation of the rules of standing is the result of a concern that the application of those rules could have an "intolerable, inhibitory effect on the freedom of speech." *Eisenstadt, 405 U.S. at 445 n.5*. Relaxation of third-party standing requirements when the statute involved could suppress constitutionally protected speech is thus the logical extension of *First Amendment* overbreadth doctrine. *See Gooding v. Wilson, 405 U.S. 518, 520-21, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972).*

n4 The *Joseph H. Munson Co.* case, relied upon by plaintiffs to support lawyer standing in this case, is thus distinguishable as a *First Amendment* case. The case is also distinguishable as one that arose in state rather than federal court. See *n. 2, supra*.

This case involves none of special circumstances that allow for exceptions to the general prudential rule against third-party standing. First, this is not a case where **[*709]** the lawyers are being prosecuted, or even a case in which they assert the right to do something without being prosecuted or disciplined. Second, this is not a case where there is already a party who seeks to vindicate his own interest, thus obviating the need to determine if third-party standing exists. Indeed, the majority holds that the district court should properly have refrained from hearing the claims of the state criminal defendants whose legal rights and interests are directly involved in this case, as a matter of federal deference to state processes. Finally, this is not a case in which the freedom of speech might be chilled by application of the third-party standing requirements.

Outside of these contexts, the Supreme Court has been firm in not permitting litigants to sue in federal court to vindicate the rights of others. *See Warth, supra*; *Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 530, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991)*. These cases have refrained from recognizing standing even where the plaintiffs' claimed injury was in not being able to profit from contracts with persons whose rights were protected by the law relied upon by the plaintiffs. Thus in *Air Courier Conference*, postal employee unions challenged a U.S. Postal Service regulation permitting private couriers to employ overnight delivery of letters to foreign countries as an exception to the statutes that generally provide for a Postal Service monopoly. The Supreme Court held that the postal monopoly statutes were not passed to protect postal employees or their unions, and that the unions accordingly lacked prudential standing. n5 *498 U.S. at 524-29*.

The Court reached this conclusion despite the clear contractual relationship between the unions and the Postal Service, as reflected in the labor-management provisions of the Postal Reorganization Act, provisions that the union plaintiffs relied upon to assert prudential standing. The Supreme Court rejected the argument:

> It would be a substantial extension of our holdings . . . to allow the Unions in this case to leapfrog from their asserted protection under the labor-management provisions of the PRA to their claim on the merits under the [postal monopoly statutes]. We decline to make that extension . . . .

498 U.S. at 530. n6

n5 More specifically, the Court held that the unions were not within the "zone of interests" of the postal monopoly statutes under the APA. As explained in footnote 1 above, it follows *a fortiori* that the unions would lack prudential standing if the APA were not applicable.

n6 Similarly, though there must be innumerable business persons who would suffer injury in fact from a contract partner's loss of a tax dispute, Justice Stewart has pithily opined that he "cannot now imagine a case, at least outside the *First Amendment* area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." *Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 46, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976)* (Stewart, J., concurring).

The Supreme Court's holdings, outside of the exceptional contexts, thus require us to find that the lawyers in this case lack standing to litigate the interests of their future unascertained clients. It would be a short step from the

majority's grant of third-party standing in this case to a holding that lawyers generally have standing to bring in court the claims of future unascertained clients. In many circumstances a lawyer could demonstrate *Article III* injury in fact with regard to such claims. For instance, a workers compensation attorney could show that the attorney's livelihood will be adversely affected by the **[*710]** implementation of a new regulation curtailing workers compensation benefits. An attorney who specializes in medical malpractice plaintiffs' cases could show that the attorney's livelihood will be adversely affected by a tort reform statute. An attorney who specializes in Social Security cases could show that a nonspeculative reduction in the attorney's income would result from the implementation of a new Social Security regulation. In each of these cases it would be anomalous for the attorney to be able to bring suit to challenge the statute or regulation, instead of a person protected by the constitutional provision or law asserted as the basis for the challenge--the injured worker, the medical malpractice plaintiff, or the Social Security claimant. Of course it may be harder for such a person to bring suit than for a lawyer to bring suit, since lawyers are often better off than their potential clients, and they are after all lawyers. But it still can't be that lawyers would generally have standing in such situations. *See Alexander v. Whitman, 114 F.3d 1392, 1408-09 (3d Cir. 1997)* (holding that attorney and law firm lacked prudential standing to challenge a state statute which provided that a wrongful death action could only be brought on behalf of a fetus if the fetus was born alive, and noting that "we can not help but wonder how the [lawyer and law firm] plaintiffs can seriously challenge the district court's ruling as to their lack of standing.") *Cf. Lambert v. Turner, 525 F.2d 1101, 1102-03 (6th Cir. 1975)* (holding that Legal Services attorney lacked standing to challenge state court judge's alleged retaliation against clients represented by Legal Services for using legal services; relying upon *Article III* and *Younger* comity).

III. The Three-Part Test Used in Exceptional Contexts

Even in the contexts where the Supreme Court has been liberal in finding third-party standing, it has used a three-part test to determine whether third-party standing is permitted. Plaintiffs argue, based on the applications of that test in the specialized circumstances contexts listed previously, that the test should be liberally applied outside of those contexts to a case where a lawyer's alleged injury is simply that he will lose business if the government is not required to give his future clients the means to hire him. Even though some of those cases permitted lawyers as parties to seek to vindicate the interests of non-party clients, they can only be reconciled with the more general rule against third-party standing if one recognizes that the standards are different in the identified contexts.

Assuming that this case falls in some new exceptional category, which it does not appear to do, the lawyer plaintiffs fail the three-part test used in those contexts. This test, formulated by the Supreme Court in *Powers, 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364*, permits a litigant to bring suit on behalf of a third party if: 1) the litigant has suffered an injury in fact, 2) the litigant has a close relationship to the third party, and 3) there is some hindrance to the third party's ability to protect his own interests. *Id. at 410-11.*

The first "prong" is but a restatement of the requirement of *Article III* standing and thus adds little to resolving whether a plaintiff who has *Article III* standing also has prudential standing. I agree with the majority that the lawyers in this case have adequately shown injury in fact because of the potential fees they will receive if successful on the merits. It is also reasonable to assume that the interests of the lawyers coincide with those of their future clients so that there is a sufficiently "close" relationship **[*711]** to the third party for purposes of the second prong of the analysis.

It appears, however, that the third prong of the test is clearly and classically not met in this case. That is, there is no hurdle to a criminal defendant who has plea bargained, and who has not been provided state-funded counsel on appeal, to challenge the lack of state-funded counsel. Not only is there no "chill," *Singleton, 428 U.S. at 117*, but--as recognized by the majority--an indigent plea-bargaining Michigan criminal defendant has already asserted his legal rights and interests in the Michigan courts, taken his case to the Michigan Supreme Court, and petitioned the U.S. Supreme Court on the merits, albeit unsuccessfully. *People v. Bulger, 462 Mich. 495, 614 N.W.2d 103 (Mich.), cert. denied, 531 U.S. 994 (2000)*. No such alternative route was likely to be used, much less already used to raise the identical claim, in those cases where the Supreme Court relied on the third prong of its test to uphold third-party standing. n7 It is thus clear that comparable third parties in this case *can* assert their own rights, only not in the lower federal courts while state proceedings are underway, and the only obstacle to the assertion of their rights in the federal courts is the abstention doctrine. n8 Equating the abstention doctrine, a legal principle of comity, with the "genuine obstacle" of *Singleton* and *Powers* deeply undermines the policies underlying both abstention and prudential standing.

n7 In my view, the fact that counsel was appointed in *Bulger* strengthens rather than weakens the point that a viable alternative route exists to bring up the issue. The potential future difficulty of obtaining appointed counsel to raise a subsequent challenge in the state courts, where that difficulty results from a square holding of the Michigan Supreme Court on the asserted constitutional claim, does not imply the absence of a route for a plaintiff with standing ever to raise the constitutional issue in the first place.

n8 While it is not necessary to my analysis in this case, it should be noted that comparable claims to

appointment of appellate counsel have been brought under federal habeas corpus. *See Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974); Evitts v. Lucey, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*.

Plaintiff lawyers in this case cannot argue that indigent state defendants who have plea bargained are not able to raise the appointment-of-appellate-counsel issue in the state courts, since a state appeal has already been taken. Moreover, according to the majority, indigent state defendants who have plea bargained can also raise the appointment-of-appellate-counsel issue in the lower federal courts, if they wait until state criminal proceedings are concluded. *Ante* at 10. The only hindrance to indigent state defendants raising the appointment-of-appellate-counsel issue is the *Younger* principle that precludes interference with ongoing state proceedings.

This is very much unlike the situation in *Caplin & Drysdale v. United States, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989)*, relied upon by plaintiffs to support lawyer standing. The *Caplin & Drysdale* Court, in a footnote, upheld third party standing for a law firm suing to get a share of its client's assets that had been seized under criminal forfeiture laws, where the law firm relied on asserted *Fifth* and *Sixth Amendment* rights of its clients. *491 U.S. at 624 n.3*. The client in order to obtain a plea agreement had agreed to forfeit all of his property to the government, leaving nothing to the lawyers. *491 U.S. at 621*. In such cases the very clients whose interest is being asserted by the lawyers are subject to plea-bargaining pressure to forgo the lawyer's claims, which the clients **[*712]** have no interest in protecting. This is exactly what happened in that case. n9 In contrast, in this case there is no perceivable obstacle to having the appointment-of-counsel issue raised by the defendants themselves. Certainly there should be no difficulty in obtaining a lawyer to litigate the issue. If the lawyer plaintiffs in this case

are willing through their own efforts to support this litigation *as parties*, there is every reason to expect them to be just as willing to *represent* indigent defendants who have plea-bargained and want to appeal. The only conceivable hurdle, then, to indigent state defendants' raising the appointment-of-counsel issue in the lower federal courts is that the abstention principles of *Younger v. Harris* apply. It makes no sense, however, to view the circumvention of *Younger* principles as an affirmative basis for relaxing prudential standing requirements. If anything, the principles underlying both *Younger* abstention and prudential standing should result in the same outcome, in this case deference to state court processes. In short, plaintiff lawyers have cited no cases in which third-party standing was permitted solely in order to restore to the lower federal courts a class of cases that otherwise by application of federalism principles would have to be brought in the state courts, subject of course to direct review in the U.S. Supreme Court.

n9 *Caplin & Drysdale*, it should be noted, is also distinguishable from the instant case because it involved direct enforcement of criminal forfeiture provisions against property claimed by the plaintiffs. See part II, *supra*.

I concur in the majority's application of *Younger* to require abstention regarding the claims of the named indigent criminal defendants in this case. I respectfully dissent from the grant of relief to the lawyers in this case who seek to litigate, as parties in federal court, the interests of future unascertained clients.

NORRIS, Circuit Judge, dissenting. In discussing whether the equal protection component of our Federal Constitution requires the appointment of counsel to help indigent defendants prepare applications for review in the context of discretionary appeals, the Supreme Court has noted, "The question is not one of absolutes, but one of degrees." *Ross v. Moffitt, 417 U.S. 600, 612, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974)*. In this close case,

I believe that the Majority Opinion cites to the proper authority and asks all of the right questions en route to its conclusion. With all due respect, however, I believe that the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system as defined by *Ross*. Accordingly, I dissent.

The provisions of the challenged statute read as follows:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> [*713] (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Mich. Comp. Laws § 770.3a. By its own terms, the statute carves out significant exceptions to the denial of counsel to indigent defendants who have pleaded guilty. These exceptions are designed to protect a defendant in those situations where he has the most at stake: when the prosecutor appeals; when the sentence falls above the sentencing range; and when he has preserved an issue by entering into a conditional plea. We note

that the Statute *requires* appointment of counsel under these circumstances.

In addition, the statute accords the trial court discretion to appoint counsel when there has been a dispute about the manner in which the sentence has been calculated or when an issue has otherwise been preserved for appeal. Furthermore, the statute seeks to protect a defendant from waiving his rights to counsel unwittingly by requiring the court to explain the implications of a guilty plea with respect to appointment of counsel. Of course, the trial court is constitutionally required to ensure that a plea is entered knowingly; nonetheless, a defendant's attention is explicitly drawn to the fact that, if he enters a guilty plea, he will not enjoy the assistance of appointed appellate counsel.

In *Ross, supra,* the Supreme Court was asked to extend the right to appointment of counsel for an appeal as of right, which was articulated in *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)*, to the preparation of petitions for leave to appeal to either the United States Supreme Court or to North Carolina's highest court. The Court declined to extend the right that far and, in so ruling, explained the constitutional underpinnings that guided its decision. After first recounting how both the Due Process and Equal Protection Clauses have been invoked in this context, the Court explained that, in its view, the Equal Protection **[*714]** Clause provided the more compelling rationale:

> It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination

of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894)*. The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas v. California, supra*. Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis.

. . . .

There are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The *Fourteenth Amendment* "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24, 93 S. Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973)*, nor does it require the State to "equalize economic conditions." *Griffin v. Illinois, 351 U.S., at 23, 76 S. Ct., at 592* (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966)*, and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin v. Illinois, supra*; *Draper v. Washington,*

372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane v. Brown, 372 U.S. 477, 481, 83 S. Ct. 768, 771, 9 L. Ed. 2d 892*, or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas v. California, supra, 372 U.S. at 358, 83 S. Ct. at 817*. The question is not one of absolutes, but one of degrees. In this case we do not believe that the *Equal Protection Clause*, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

Ross, 417 U.S. at 610-12 (footnote omitted).

A month after the district court issued its injunctive order in the case before us, the Michigan Supreme Court released an opinion holding that the indigent defendants are not "entitled to the appointment of counsel at public expense when applying for leave to appeal a plea-based conviction." *Michigan v. Bulger, 462 Mich. 495, 499, 614 N.W.2d 103, 104, cert. denied, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 486 (2000)*. It offered the following rationale:

> Appeals from plea-based convictions and appeals from convictions obtained **[*715]** following trials, like those appeals at issue in *Douglas* and *Ross*, are fundamentally different. Foremost, a defendant who tenders a plea has admitted guilt of the offense in open court. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal

process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).*

. . . In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. These are all reasoned distinctions that are relevant to determining whether Michigan provides "meaningful access" to the appellate courts.

Bulger, 462 Mich. at 515-517, 614 N.W.2d at 112-13 (citations and footnote omitted).

Plaintiffs take issue with the distinction drawn by the Michigan Supreme Court between appeals of right and discretionary appeals. In their view, this emphasis is misplaced. Instead, the key is whether the appeal is a defendant's first appeal. Hence, this case is closer to *Douglas* than to *Ross* because the latter involved a discretionary appeal after the first appeal of right had been adjudicated. They point to the following language in *Douglas*: "Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas, 372 U.S. at 357*. They buttress the force of this observation by pointing out that, as of 1987, 47 states permitted first appeals as of right and that cases like *Anders v. California, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967)*, referred to the right to have counsel advocate on one's behalf in the "first appeal."

As already mentioned, however, "the question is not one of absolutes, but one of degrees." *Ross, 417 U.S. at 612*. While the appeal at issue in this case is undoubtedly a defendant's first appeal, it has also been rendered discretionary by his decision to plead guilty. The state has a fundamental interest in the finality of guilty pleas, *Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985)*, and by entering a plea a defendant has voluntarily acknowledged that he does not dispute the factual basis of the state's case against him. Given that there has not been an underlying trial, the number of issues for appeal has been greatly reduced. n1 Furthermore, the statute provides that a defendant can guarantee himself appointed appellate counsel by entering a conditional plea that preserves those issues that trial counsel has identified as viable on appeal. *Mich. Comp. Laws § 770.3a(2)(d)*. In short, the protections built into the statute convince me that in **[*716]** this "matter of degrees" the balance tips in favor of constitutionality.

n1 It is worth noting that this court has upheld plea agreements in which defendants unconditionally waive the right to appeal. *See, e.g., United States v. Fleming, 239 F.3d 761, 763-64 (6th Cir. 2001)* (defendant in criminal case may waive the right to appeal); *United States v. Allison, 59 F.3d 43, 46-47 (6th Cir. 1995)* (same); *United States v. Ashe, 47 F.3d 770, 775-76 (6th Cir. 1995)* (same). While not completely analogous, it nonetheless strikes me as inconsistent that we would approve a practice that potentially cuts off all appellate avenues while striking down the Michigan scheme, which leaves limited, statutorily defined appellate remedies available to defendants.

In addition to the protections built into the statute itself, Michigan's Supreme Court has interpreted its own court rules to "require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues

that warrant preservation." *Bulger, 462 Mich. at 518, 614 N.W.2d at 113* (interpreting Mich. Ct. R. 6.005(H)(4), which provides that "the responsibilities of the trial lawyer appointed to represent the defendant include . . . unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing."). As a federal court, we are bound by Michigan's highest court's interpretation of the Michigan's court rules. *See Moore v. Sims, 442 U.S. 415, 427, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979)* (noting "the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework").

In *Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967),* the Supreme Court found unconstitutional California's practice of allowing a defendant's appointed counsel to review the defendant's trial record, and then withdraw from representation by submitting a letter to the reviewing court stating that, in his opinion, there existed no meritorious grounds for appeal. *386 U.S. at 743*. The Court held, nonetheless, that the appointed counselor could ask to withdraw and opine on the merits of the case before the reviewing court if he attached to his request to withdraw "a brief referring to anything in the record that might arguably support the appeal;" the reviewing court would then have the ability to review the case and ask the counselor to remain as a representative of the defendant if the court found any meritorious grounds for appeal. *Id. at 744*. Though not obligatory on the States, such a process would pass constitutional muster. *Smith v. Robbins, 528 U.S. 259, 272-73, 145 L. Ed. 2d 756, 120 S. Ct. 746 (2000).*

The Court in *Smith*, after reviewing *Evitts, Ross, Douglas*, and other cases dealing with an indigent defendant's right to

counsel on appeal, stated that, in sum, the Constitution requires that "a State's procedure afford adequate and effective appellate review to indigent defendants, . . . [which it does] so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Smith, 528 U.S. at 276-77* (internal quotations and citations omitted). In the case before us, even though the defendant's trial lawyer is only required to present "potential issues that warrant preservation" to the *trial* court, the defendant is nonetheless left with the benefits of a lawyer's review of the record and is not placed in the situation, condemned by the Supreme Court, "where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself." *Douglas v. California, 372 U.S. 353, 358, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)*. Given that Michigan law requires a defendant's appointed trial lawyer to "assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation," *Bulger, 462 Mich. at 518, 614 N.W.2d at 113,* and that the trial court is required to appoint appellate counsel if the appellate court grants leave to appeal, *Mich. Comp. Laws § 770.3a(2)(c)*, I fail to see how Michigan's statutory scheme unconstitutionally bars an indigent defendant's meaningful access to the court system.

Finally, the Majority Opinion acknowledges that we are obliged to fill in the gaps left by the Supreme Court on this issue. To that end, I note that the Court denied certiorari in *Bulger, supra,* an opinion that came to a contrary conclusion on the practice, if not the actual statute, at issue in this case despite an entreaty from the dissent that the Court take the case to "correct the constitutional miscarriage committed by the majority." *462 Mich. at 522, 614 N.W.2d at 115* (Cavanagh, J., dissenting). While not dispositive of the matter before us, the Court's denial of certiorari strikes me as entitled to some

weight in our effort to determine where, in this "matter of degrees," the Court might draw the line.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Nos. 00-1824/1845

Filed
Jun 17, 2003
Leonard Green, Clerk

JOHN CLIFFORD TESMER; CHARLES CARTER; and ALOIS SCHNELL, on behalf of all similarly situated individuals; ARTHUR M. FITZGERALD; and MICHAEL D. VOGLER,

Plaintiffs-Appellees,

v.

JENNIFER M. GRANHOLM, Attorney General,

Defendant,

JUDGE JOHN F. KOWALSKI; JUDGE WILLIAM A. CRANE; and JUDGE LYNDA L. HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges,

Defendants-Appellants (00-1824),

JUDGE DENNIS C. KOLENDA, Appellant (00-1845).

Before: MARTIN, Chief Circuit Judge; BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Bay City.

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs.

THIS CAUSE was heard and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-1824/00-1845

295 F.3d 536; 2002 U.S. App. LEXIS 13148; 2002 FED App. 0220P (6th Cir.)

JOHN CLIFFORD TESMER; CHARLES CARTER; and ALOIS SCHNELL, on behalf of all similarly situated individuals; ARTHUR M. FITZGERALD; and MICHAEL D. VOGLER, Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, Attorney General, Defendant, JUDGE JOHN F. KOWALSKI; JUDGE WILLIAM A. CRANE; and JUDGE LYNDA L. HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, Defendants-Appellants, JUDGE DENNIS C. KOLENDA, Appellant.

December 5, 2001, Argued
July 2, 2002, Decided
July 2, 2002, Filed

JUDGES: Before: NORRIS, SILER, and BATCHELDER, Circuit Judges.

[*538] ALAN E. NORRIS, Circuit Judge. As amended in 1994, the Michigan Constitution provides that individuals who plead guilty to a crime may only appeal by leave of the court. Mich. Const. 1963, Art. 1, § 20. The question litigated below centered on whether the federal constitution requires appointment of counsel to assist indigent defendants who wish to apply for leave to appeal. The district court issued a declaratory judgment holding that the denial of appointed counsel under these circumstances violates the United States Constitution. In an effort to enforce its judgment, the court enjoined the Michigan judiciary from following the contested provision of the Michigan Constitution, as well as the statute designed to codify it.

[*539] We conclude that the district court should have abstained from hearing the claims of the three criminal-defendant plaintiffs because they could have raised their constitutional claims in their pending state court proceedings, as evidenced by the fact that a nearly identical challenge was wending its way through the courts of Michigan at the time that the litigation before us was commenced. That does not end our inquiry, however, because we agree with the district court that the two attorney plaintiffs had *jus tertii* standing to challenge the statute codifying the practice of appointing appellate counsel to indigent defendants. Nonetheless, we hold that the statute at issue sufficiently protects an indigent defendant's constitutional rights.

Accordingly, we dissolve the injunction issued by the district court, reverse and vacate its grant of declaratory relief, and remand the matter with instructions to enter judgment in favor of defendants.

I.

The plaintiffs, three criminal defendants and two attorneys who accept appointments to represent criminal defendants in law appeals, filed suit in federal court on March 2, 2000,

alleging that the practice of denying appointed appellate counsel to indigent defendants who have pleaded guilty or nolo contendere in Michigan courts violated the federal constitution. Defendants included three circuit court judges who had declined to appoint counsel to plaintiffs after accepting their guilty pleas. n1

n1 The complaint also named Jennifer Granholm, the Attorney General of Michigan, as a defendant in her official capacity. She is not a party to this appeal.

Although the constitutional violations alleged in the complaint occurred prior to the enactment of the statute that codified the provision of the Michigan Constitution at issue, *1999 P.A. 200;* Mich. Comp. Laws § 770.3a (2000) ("the statute"), the attorney plaintiffs sought an order declaring that it, too, ran afoul of the federal constitution. On March 31, 2000, the district court granted declaratory relief, holding that "the practices of the judicial officer Defendants and other similarly situated state circuit court judges, of denying indigents who have pleaded guilty or nolo contendere the right to appointed appellate counsel in preparing applications for leave to appeal, to be in violation of the indigents' equal protection and due process rights guaranteed under the United States Constitution." *Tesmer v. Granholm, 114 F. Supp. 2d 603, 606 (E.D. Mich. 2000).* The district court struck down the statute for the same reason. *Id.*

After this declaratory judgment was entered, plaintiffs sought injunctive relief because certain Michigan judges continued to deny appointed counsel in these situations. The district court enjoined all Michigan judges from taking any action whatsoever to enforce or implement the statute. *Tesmer v. Kowalski, 114 F. Supp. 2d 622, 629 (E.D. Mich. 2000).* The three named defendant judges have appealed from this injunction, as has Judge Dennis C. Kolenda, who was not named as an original defendant but who was nonetheless affected by the district court's action.

While this litigation was progressing in federal court, an action involving this same question was making its way through the courts of Michigan. Ultimately the Michigan Supreme Court issued an opinion that contrasted sharply to that of the district court:

> We granted leave in this case to determine whether an indigent defendant is entitled to the appointment of appellate counsel at public expense when applying for leave to appeal a plea-based **[*540]** conviction. We hold that neither the state nor the federal constitution requires the appointment of counsel under these circumstances. Under our federalist scheme of government, Michigan remains free to decide the conditions under which appellate counsel will be provided where our state constitution commands that the mechanism of appellate review is discretionary. Const. 1963, art. 1, § 20.

People v. Bulger, 462 Mich. 495, 499, 614 N.W.2d 103, 104-05, cert. denied, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 486 (Mich. 2000). The Michigan Supreme Court did not reach the constitutionality of the statute, however, because it did not apply to defendant. *Bulger, 462 Mich. at 506, 614 N.W.2d at 107.*

II.

As they did below, defendants argue that the district court should have abstained from taking action because the ongoing criminal proceedings in the courts of Michigan provided plaintiffs who had pleaded guilty with an adequate opportunity to press their constitutional challenges. They also urge us to find that the attorney plaintiffs lacked standing to bring suit. We will address each of these arguments in turn.

1. Abstention

In *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971),* the Supreme Court counseled federal courts to abstain from adjudicating a matter otherwise properly before it in deference to pending state criminal proceedings in the interest of "Our Federalism." *Id. at 43-45; Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975)* (discussing comity and other concerns of federalism); *see also Zalman v. Armstrong, 802 F.2d 199, 201-02 (6th Cir. 1986).* In a companion case, the Court held that the rule announced in *Younger* with respect to injunctive relief applied with equal force to requests for declaratory relief:

> In cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Samuels v. Mackell, 401 U.S. 66, 73, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971).

This circuit looks to three factors when determining whether *Younger* abstention is appropriate: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *Tindall v. Wayne County Friend of the Court, 269 F.3d 533, 538 (6th Cir. 2001); Cooper v. Parrish, 203 F.3d 937, 954 (6th Cir. 2000); Hayse v. Wethington, 110 F.3d 18, 20 (6th Cir. 1997); Zalman, 802 F.2d at 202.* In a nutshell, *Younger* instructs a federal court to abstain "when the state's interest is

so important that exercising federal jurisdiction would disrupt the comity between federal and state courts." *Hayse, 110 F.3d at 20.* We review the district court's decision respecting abstention de novo. *Tindall, 269 F.3d at 538.*

A. Pending State Action

We begin by asking whether the first requirement for *Younger* abstention has been satisfied: the existence of pending state-court proceedings involving plaintiffs. In answering this question, "the **[*541]** proper time of reference for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." *Zalman, 802 F.2d at 204.* A case remains pending until the litigant has exhausted his state appellate remedies. *Huffman, 420 U.S. at 609; see also Foster v. Kassulke, 898 F.2d 1144, 1146 (6th Cir. 1990).* Moreover, the existence of state habeas corpus relief may keep a claim pending for purposes of abstention analysis. *Foster 898 F.2d at 1146.*

As mentioned earlier, the complaint includes five plaintiffs: three criminal defendants who pleaded guilty and two attorneys who allege that they have accepted referrals in the past and contemplate doing so in the future. The parties agree that abstention only applies to the criminal-defendant plaintiffs Tesmer, Carter, and Schnell.

According to the complaint, plaintiff Tesmer pleaded guilty to a charge of home invasion in 1999. He then presented a written request to the sentencing court for the appointment of an appellate attorney to prepare an application for leave to appeal. This request was denied on September 7, 1999. The district court concluded that it should abstain from adjudicating Tesmer's claim because he was party to a pending action in state court, he had adequate opportunity to raise his constitutional arguments in the state court proceeding, and no extraordinary circumstances justified interference in these state court proceedings. *Tesmer v. Granholm, 114 F. Supp. 2d at*

612-14. Appellees do not challenge the district court's decision to abstain in the case of Mr. Tesmer.

With respect to plaintiff Carter, the district court noted that an action was pending in state court. However, it found abstention to be inappropriate as to him because he lacked an adequate opportunity to raise his constitutional claim, a conclusion that will be discussed in the next section of this opinion.

Finally, the district court concluded that plaintiff Schnell did not have a pending state action. *Id. at 612.* His application for leave to appeal had been denied on April 1, 1999 and his request for rehearing was denied on May 25, 1999. Under the appropriate Michigan rules, Schnell had 56 days in which to file a delayed application for leave to appeal with the Michigan Supreme Court. Thus, in the district court's view, at the time the federal complaint was filed, Schnell's state action had been completed and abstention as to him was inappropriate. *Id.*

We disagree with this analysis. As our decision in *Foster, supra, makes clear, the decision to abandon avenues of state-court relief does not necessarily rule out abstention. In Foster,* plaintiff challenged the constitutionality of a Kentucky statute limiting the amount of compensation to which her appointed counsel was entitled, as well as the practice of not providing a trial transcript. *Foster, 898 F.2d at 1145.* While her claims had been denied by the courts of Kentucky at the time her § 1983 complaint was filed, this court concluded that she could pursue her claims on direct appeal and, failing there, could resort to state habeas relief:

> In seeking injunctive relief in her section 1983 action, she is attempting to obtain federal review of state court procedures in a criminal case before the state court has had the opportunity to decide them finally. Federal review should be given in the context of a federal habeas proceeding following

> the appropriate exhaustion of state remedies, where concerns of equity, comity, and federalism -- concerns that *Younger* teaches require abstention -- are accommodated.

[*542] *Id. at 1146-47.* In short, *Younger* requires that a party exhaust state remedies before instituting a constitutional challenge in federal court. In *Huffman*, for instance, the plaintiff failed to take an appeal from an adverse trial court decision and instead filed suit in federal court. He argued that *Younger* should not apply because the state court litigation had ended. The Court disagreed, noting that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Huffman, 420 U.S. at 608.* This is so "because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions." *420 U.S. at 609.* Moreover, "the considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious." *420 U.S. at 610.*

In our view, the considerations delineated in *Huffman* apply to plaintiff Schnell. His failure to pursue his claim by filing a delayed application for leave to appeal with the Michigan Supreme Court or, for that matter, instituting a habeas corpus action under Michigan law, Mich. Comp. Laws § § 600.4301-87, means that he has failed to exhaust his state court remedies and abstention is therefore appropriate unless "he can bring himself within one of the exceptions specified in *Younger*." *Huffman, 420 U.S. at 608; see also Foster, 898 F.2d at 1146* ("even assuming an adverse judgment on appeal, [plaintiff] still has resort to state habeas relief, where the constitutionality of the state procedures could be determined by the state court.").

Accordingly, we conclude that each of the three criminal-defendant plaintiffs had an ongoing state court proceeding at the time that the federal complaint in this action was filed.

B. Adequate Opportunity to Raise Constitutional Claims

In considering the applicability of the *Younger* abstention doctrine, the federal plaintiff "has the burden to show that the state procedural law barred presentation of [its] claims." *Armco, Inc. v. USW, AFL-CIO, Local 169, 280 F.3d 669, 682 (6th Cir. 2002)* (internal punctuation omitted) (citing *Federal Express Corp. v. Tennessee Public Serv. Comm'n, 925 F.2d 962, 970 (6th Cir. 1991)).* A federal court should not exert jurisdiction if the plaintiff had an opportunity to present his federal claim in state proceedings. *Moore v. Sims, 442 U.S. 415, 425, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979)* (citing *Juidice v. Vail, 430 U.S. 327, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977)).* Accordingly, "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." *442 U.S. at 425-26.* Put another way, "When a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987).*

The district court found that plaintiff Tesmer had an adequate opportunity to present his federal claims because he filed a "lawyerly brief" seeking a delayed application for leave to appeal. *Tesmer v. Granholm, 114 F. Supp. 2d at 613.* The court concluded, however, that plaintiff Carter, though similarly situated, did not have such an opportunity because he filed a declaration stating that "he did not have a **[*543]** lawyer to represent him and he did not know the law." *Id.*

We are unable to agree with the district court's view of the scope of its inquiry with respect to whether the state provided

plaintiff Carter with an adequate opportunity to raise his constitutional claims. The "adequate opportunity" prong of the abstention doctrine requires a generalized review of the procedures made available by the state to raise constitutional issues. As the cases cited above make abundantly clear, in the absence of compelling evidence to the contrary, there is a strong presumption of adequacy.

Here, the district court determined that plaintiff Tesmer had an adequate opportunity to raise his claim. If he had an adequate opportunity, then plaintiff Carter, who was similarly situated, did also. That plaintiff Carter was allegedly unable to take advantage of the opportunity because of the lack of appointed counsel has no bearing upon the *Younger* inquiry; it goes directly to the merits of the case. Furthermore, the adequacy of the state mechanism for raising the constitutional claim is evident given that a criminal defendant managed to present nearly the identical claim to the Michigan Supreme Court in *Bulger, 462 Mich. 495, 614 N.W.2d 103.*

Of course, the fact that the district court should have abstained does not mean that plaintiff Carter can never pursue his claim in a federal forum. The *Younger* abstention doctrine merely delays federal adjudication, it does not preclude it. *See Huffman, 420 U.S. at 606* ("Assuming . . . that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings.") (emphasis original). n2

> n2 As the Court recognized in *Huffman*, we do not mean "to suggest that there is a right of access to a federal forum for the disposition of all federal issues." *Huffman, 420 U.S. at 606, n.18, 43 L. Ed. 2d 482, 95 S. Ct. 1200.*

C. Extraordinary Circumstances

The district court considered whether extraordinary circumstances existed that would make abstention inappropriate only with respect to plaintiff Tesmer. However, given the similarity of their situations, the same analysis applies to all three criminal-defendant plaintiffs.

Circumstances justifying federal court interference with state proceedings only exist where irreparable injury is both "great and immediate"; where the state law is "flagrantly and patently violative of express constitutional prohibitions"; or where there is a showing of "bad faith, harassment, or any other unusual circumstances that would call for equitable relief." *Younger, 401 U.S. at 46, 53-54.* We agree with the district court's conclusion that plaintiffs have failed to show that such circumstances exist in this case.

D. Conclusion

For the reasons outlined above, we conclude that the district court should have abstained from hearing the claims of the criminal-defendant plaintiffs. As *Younger* and its progeny make clear, the principles of "Our Federalism" dictate that state courts generally be given an opportunity in the first instance to adjudicate cases without federal interference. *Younger, 401 U.S. at 43-45.* The district court's decision respecting abstention is therefore reversed.

2. *Jus Tertii* Standing for Attorney Plaintiffs

As the district court recognized, the three criminal-defendant plaintiffs could not challenge the constitutionality of the statute that codified the allegedly unconstitutional practice of denying appointment of appellate counsel because it had not been enacted at the time that they pleaded guilty. Consequently, that constitutional challenge could only be raised, if at all, by attorney plaintiffs.

Defendants contend that the attorneys lack standing because they are asserting the rights of third parties, indigent defendants. In order to press their claims, they must have suffered an "injury in fact." As already mentioned, the complaint alleges that both attorneys earn a portion of their income by "taking assigned appeals from trial and plea based convictions" and that the Statute will "adversely affect the incomes of Mr. Fitzgerald and Mr. Vogler in that it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel."

The district court concluded, and we agree, that the doctrine of *jus tertii* applies under these circumstances. The Supreme Court has explained that the doctrine permits a litigant to bring suit on behalf of a third party provided certain conditions apply: the litigant must have suffered an injury in fact; he must have a close relation to the third party; and there must be some hindrance to the ability of the third party to assert his own interests. *See Powers v. Ohio, 499 U.S. 400, 410-411, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991).*

The Supreme Court's analysis in *Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976),* applies forcefully to the facts before us. In *Singleton*, two physicians challenged restrictions on funding for abortions performed for Medicaid-eligible patients. The Court began by observing that, "'ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.'" *Id. at 114* (quoting *Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953)).* However, this rule "should not be applied where its underlying justifications are absent." *Id.*

The Court first found that the physicians alleged a concrete injury:

> If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense.

Singleton, 428 U.S. at 113. The same reasoning applies to the attorney plaintiffs. They have alleged that they have represented indigent defendants in the past for which they received payment from the state and that they will continue to do so in the future. As in *Singleton*, plaintiffs will suffer an actual injury if the statute remains in force.

The next consideration concerns the relationship between the litigants and the persons whose rights they seek to enforce:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Id. at 114-15. Applying this test to the facts before it, the district court concluded that the relationship between the attorneys and the indigent defendants was sufficient:

> The Attorneys have a close relationship to indigent defendants who are denied appellate counsel; and, the Attorneys are the appellate counsel whose services are being denied. Furthermore, just as a woman cannot safely secure an abortion without a

> physician, indigent defendants need counsel to effectively present their appellate claims.

Tesmer v. Granholm, 114 F. Supp. 2d at 610. This reasoning strikes us as correct. While the indigent defendants seek counsel and the attorney plaintiffs seek payment for their services, both parties seek the same end: the nullification of the statute. Accordingly, we conclude that the interests of the attorney plaintiffs are sufficiently close to those of indigent defendants to support *jus tertii* jurisdiction.

Finally, in *Singleton*, the Supreme Court sketched the third jurisdictional requirement in these terms:

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by the default the right's best available proponent.

428 U.S. at 116. This involves something short of the absolute procedural bar required to overcome the principle of abstention. *Id.* at n.6. (stating that this does not require that "assertion by the third parties would be in 'all practical terms impossible'") (internal citation omitted). In the case before us, the criminal-defendant plaintiffs assert that they have been deprived of effective access to the courts. As the district court put it, "indigent defendants denied appellate counsel face significant, insurmountable obstacles in bringing their own challenges to the [statute]." *Tesmer, 114 F. Supp. 2d at 611.* Although these obstacles are insufficient to overcome the more stringent requirements of abstention, they are sufficient to satisfy the requirements for *jus tertii* standing.

In our view, the district court correctly concluded that the attorney plaintiffs met the criteria for *jus tertii* jurisdiction outlined by the Court in *Singleton* and *Powers*. Accordingly, they have standing to challenge the Statute. We now turn to the merits of their claim.

3. Constitutionality of the Statute

The provisions of the challenged statute at issue read as follows:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel **[***15]** appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> **[*546]** (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.30(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads

guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Mich. Comp. Laws § 770.3a. By its own terms, the statute carves out significant exceptions to the denial of counsel to indigent defendants who have pleaded guilty. These exceptions are designed to protect a defendant in those situations where he

has the most at stake: when the prosecutor appeals; when the sentence falls above the sentencing range; and when he has preserved an issue by entering into a conditional plea. We note that the statute *requires* appointment of counsel under these circumstances.

In addition, the statute accords the trial court discretion to appoint counsel when there has been a dispute about the manner in which the sentence has been calculated or when an issue has otherwise been preserved for appeal. Furthermore, the statute seeks to protect a defendant from waiving his right to counsel unwittingly by requiring the court to explain the implications of a guilty plea with respect to appointment of counsel. Of course, the trial court is constitutionally required to ensure that a plea is entered knowingly; nonetheless, a defendant's attention is explicitly drawn to the fact that, if he enters a guilty plea, he will not enjoy the assistance of appointed appellate counsel.

Despite these protections, the district court held that the statute violated the United States Constitution: "When a rich man is given a meaningful opportunity to appeal while a poor man is given only a meaningless ritual, that is invidious discrimination." *Tesmer, 114 F. Supp. 2d at 618-19* (citing *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963))*. While this is a close question, we disagree with the conclusion of the district court.

In *Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974),* the Supreme Court was asked to extend the right to appointment of counsel for an appeal as of right, which was articulated in *Douglas,* to the preparation of petitions for leave to appeal to either the United States Supreme **[*547]** Court or to North Carolina's highest court. The Court declined to extend the right that far and, in so ruling, explained the constitutional underpinnings that guided its decision. After first recounting how both the Due Process and Equal Protection Clauses have been invoked in this context, the Court explained that the

Equal Protection Clause provided the more compelling rationale:

> It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894).* The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas v. California, supra.* Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis.
>
> . . . .
>
> There are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriguez, 411*

> *U.S. 1, 24, 93 S. Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973),* nor does it require the State to "equalize economic conditions." *Griffin v. Illinois, 351 U.S. 12, 23, 100 L. Ed. 891, 76 S. Ct. 585, 592* (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966),* and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin v. Illinois, supra; Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963).* The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane v. Brown, 372 U.S. 477, 481, 9 L. Ed. 2d 892, 83 S. Ct. 768, 771,* or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas v. California, supra, 372 U.S. at 358, 83 S. Ct. at 817. The question is not one of absolutes, but one of degrees.* In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

Ross, 417 U.S. at 610-12 (footnote omitted) (emphasis added).

A month after the district court issued its injunctive order in the case before us, the Michigan Supreme Court released an opinion holding the indigent defendants are not "entitled to the appointment of counsel at public expense when applying **[*548]** for leave to appeal a plea-based conviction." *Bulger,*

462 Mich. at 499, 614 N.W.2d at 104. It offered the following rationale:

> Appeals from plea-based convictions and appeals from convictions obtained following trials, like those appeals at issue in *Douglas* and *Ross*, are fundamentally different. Foremost, a defendant who tenders a plea has admitted guilt of the offense in open court. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).*
>
> . . . .
>
> . . . In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. These are all reasoned distinctions that are relevant to determining whether Michigan provides "meaningful access" to the appellate courts.

Bulger, 462 Mich. at 515-517, 614 N.W.2d at 112-13 (citations and footnote omitted).

Plaintiffs take issue with the distinction drawn by the Michigan Supreme Court between appeals of right and discretionary appeals. In their view, this emphasis is misplaced. Instead, the key is whether the appeal is a

defendant's first appeal. Hence, they contend this case is closer to *Douglas* than to *Ross* because the latter involved a discretionary appeal after the first appeal of right had been adjudicated. They point to the following language in *Douglas*: "Where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas, 372 U.S. at 357.* They buttress the force of this observation by pointing out that, as of 1987, 47 states permitted first appeals as of right and that cases like *Anders v. California, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967),* referred to the right to have counsel advocate on one's behalf in the "first appeal."

As the Supreme Court noted, "The question is not one of absolutes, but one of degrees." *Ross, 417 U.S. at 612.* While the appeal at issue in this case is undoubtedly a defendant's first appeal, it has also been rendered discretionary by his decision to plead guilty. The state has a fundamental interest in the finality of guilty pleas, *Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985),* and by entering a plea a defendant has voluntarily acknowledged that he does not dispute the factual basis of the state's case against him. Given that there has not been an underlying trial, the number of issues for appeal has been greatly reduced. Furthermore, the statute provides that a defendant can guarantee himself appointed appellate counsel by entering a conditional plea that preserves those issues that trial counsel has identified as viable on appeal. Mich. Comp. Laws § 770.3a(2)(d). In short, the protections built into the statute convince us that in this "matter of degrees" the balance tips in favor of constitutionality. n3

> n3 While it does not bind us, we note that the Supreme Court declined to grant certiorari to review the Michigan Supreme Court's *Bulger* decision.

[*549] III.

The injunction ordered by the district court is **dissolved**, the declaratory judgment is **vacated**, and this cause is **remanded** to the district court with instructions to enter judgment in favor of defendants.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
00-1824/00-1845

307 F.3d 459; 2002 U.S. App. LEXIS 19754

John Clifford Tesmer, et al., Plaintiffs-Appellees,

v

Jennifer Granholm, Attorney General, Defendant,
Judge John F. Kowalski, et al., Defendants-Appellants (00-1824),

Judge Dennis C. Kolenda, Appellant (00-1845).

September 20, 2002, Filed

Before: Martin, Chief Judge; Boggs, Batchelder, Daughtrey, Moore, Cole, Clay, Gilman, And Gibbons, Circuit Judges.

[*459] ORDER

A majority of the Judges of this Circuit in regular active service have voted for rehearing **[*460]** of these cases en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court vacated, the mandate is stayed and these cases are restored to the docket as pending appeals.

It is further ORDERED that the parties file supplemental briefs not later than the close of business Friday, October 25,

2002. Reargument is scheduled for Wednesday, December 11, 2002.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

CASE NUMBER: 00-10082

114 F. Supp. 2d 603; 2000 U.S. Dist. LEXIS 16346

JOHN CLIFFORD TESMER, CHARLES CARTER, and ALOIS SCHNELL, on behalf of themselves and all similarly situated individuals, and ARTHUR M. FITZGERALD and MICHAEL D. VOGLER, Plaintiff(s),

v.

JENNIFER GRANHOLM, Attorney General of the State of Michigan, in her official capacity; and JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE and JUDGE LYNDA HEATHSCOTT, in their official capacity, individually and as representatives of a class of similarly situated circuit court judges, Defendant(s).

March 31, 2000, Decided

JUDGES: Victoria A. Roberts, United States District Judge.

[*605] OPINION AND ORDER: (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, (2) DENYING PLAINTIFFS'

MOTION FOR PRELIMINARY INJUNCTION; AND (3) GRANTING PLAINTIFFS' REQUEST FOR DECLARATORY JUDGMENT

I. Introduction

This *42 U.S.C. § 1983* matter is before the Court on Defendants' Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction. The Complaint, filed March 2, 2000, further requests that this Court issue an Order declaring that P.A. 1999 No. 200, violates the Plaintiffs' rights to due process and equal protection as guaranteed by the United States Constitution, and further declaring that the judicial officer Defendants acted under color of law, in violation of § 1983, in denying indigents the appointment of counsel to prepare original appeals from their plea-based convictions.

For the reasons stated below, the Court grants in part and denies in part Defendants' Motion to Dismiss. Further, while the Court finds that the judicial officer Defendants acted under color of law in denying indigents' requests for the appointment of counsel, § 1983 does not permit injunctive relief against a judicial officer for action taken in that officer's judicial capacity, unless such officer has violated a declaratory decree or declaratory relief was unavailable. Hence, this Court denies Plaintiffs' Motion For Preliminary Injunction.

However, pursuant to the Plaintiffs' request for relief in their complaint, the Court finds this case to be an appropriate one for declaratory **[**3]** relief under Fed. R. Civ. P. 57 and *28 U.S.C. § 2201*. Accordingly, **[*606]** the Court declares the practices of the judicial officer Defendants and other similarly situated state circuit court judges, of denying indigents who have pleaded guilty or nolo contendere the right to appointed appellate counsel in preparing applications for leave to appeal, to be in violation of the indigents' equal protection and due process rights guaranteed under the United States Constitution.

Additionally, the Court declares that *1999 P.A. 200*, scheduled to take effect on April 1, 2000, is unconstitutional in that it denies equal protection and due process to indigent individuals who have pleaded guilty or nolo contendere.

II. Background

In November 1994, Michigan's constitution was amended to eliminate appeals of right for criminal defendants who pled guilty or nolo contendere. Specifically, MI. Const. 1963, Art. 1, § 20 was amended to provide that criminal defendants may:

> appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Plaintiffs allege that after the amendment to § 20, a number of Michigan circuit court judges began to routinely deny the requests of indigent Defendants for the appointment of appellate counsel to prepare applications for leave to appeal their plea-based convictions and sentences. This practice is especially prevalent in the 10th Circuit Court in Saginaw, according to Plaintiffs (Cmpt. at P 18).

Three Plaintiffs allege that, consistent with this practice, the named judicial officer Defendants denied them appellate counsel. Plaintiff John Clifford Tesmer pled guilty to a charge of home invasion in 1999. After Defendant Judge John F. Kowalski of the 26th Circuit Court of Alcona sentenced Plaintiff, the judge denied Tesmer's request for appointed appellate counsel (Cmpt. at PP 19-22). After his 1999 guilty plea and sentencing for the charge of attempted murder, Plaintiff Charles Carter was denied appointed appellate counsel by Defendant Judge William A. Crane of the 10th Circuit Court (Cmpt. at PP 23-26). Likewise, Plaintiff Alois Schnell

was denied appellate counsel by Defendant Judge Lynda L. Heathscott of the 10th Circuit after Schnell's pled guilty to operating a vehicle under the influence of liquor (Cmpt. at PP 27-30). (Hereinafter, Judges Kowalski, Crane and Heathscott will be referred to as "the Judges," and Mr. Tesmer, Mr. Carter and Mr. Schnell will collectively be referred to as "the Indigents.")

The practice of denying appellate counsel to indigent Defendants who plead guilty or nolo contendere has now been codified. P.A. 1999, No. 200 provides:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, **[*607]** or nolo contendere if all of the following apply:
>
> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
>
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
>
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
>
> (4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other post conviction **[**7]** remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

(Hereinafter, the "Act").

Plaintiffs allege that, although the appointment of appellate counsel is authorized under the circumstances set forth in subsections 2 and 3, the Act will prohibit circuit court judges from appointing counsel to indigent defendants in most plea-based applications for leave to appeal (Cmpt. at P 32). n1

n1 Note that the practice and Act alleged to be unconstitutional involve the denial of counsel for the preparation of applications for leave to appeal. When leave to appeal is granted, the Act explicitly requires that appointed counsel be provided to indigent defendants.

The other two Plaintiffs are attorneys. Arthur M. Fitzgerald and Michael D. Vogler allege that they earn a portion of their incomes taking assigned appeals for trial and plea based convictions. Fitzgerald is on a list of qualified attorneys to take such assignments in the 10th Circuit while Vogler is on the 26th Circuit Court's list. Plaintiffs allege that the present practice of denying appellate counsel after plea-based convictions has adversely affected the attorneys' incomes and the Act will do the same (Cmpt at PP33-36). "Mr. Fitzgerald and Mr. Vogler also assert, under the doctrine of *jus tertii*, the constitutional rights of the indigent criminal defendants who will plead guilty or nolo contendere after April 1, 2000 and who will request, but be denied, the appointment of appellate counsel, based on the operation of P.A. 1999, No. 200." (Cmpt. at P 37). (Hereinafter, Mr. Fitzgerald and Mr. Vogler will be referred to as "the Attorneys.")

In addition to the Judges, Plaintiffs also name Michigan Attorney General Jennifer Granholm, in her official capacity, as a Defendant (Cmpt. at P 11).

Plaintiffs' Complaint is filed pursuant to § 1983. They allege that the practice of the Judges violates Plaintiffs' due process and equal protection rights and that the Act will do the same (Cmpt. at PP38-45). They assert their claims on behalf of a putative Plaintiff class consisting of all indigent Defendants who have pled or will plead guilty or nolo contendere in a Michigan court and who have or will request the appointment of appellate counsel (Cmpt. at 46). Plaintiffs' claims are asserted against the named Defendants as well as against a putative Defendant class consisting of all Michigan circuit court judges and their successors (Cmpt. at P 48).

III. Analysis

Plaintiffs' Motion for Preliminary Injunction focuses on the alleged illegality of the offending practice and the Act, while Defendants' Motion to Dismiss primarily **[*608]** challenges Plaintiffs' standing to bring this action and this Court's jurisdiction. Since standing and jurisdiction are threshold matters, this Opinion begins with those issues and ends with the merits of Plaintiffs' constitutional claims.

A. The Standing of the Attorneys to Challenge the Act

"Article III, § 2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.' Standing to sue or defend is an aspect of the case or controversy requirement." *Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997).*

Defendants primarily assert that the Attorneys have no direct stake in the controversy at issue here. Notwithstanding the Attorneys alleged loss of income, if criminal defendants are entitled to appellate counsel to prepare their applications for leave to appeal their plea based conviction, that right belongs to the criminal defendants only, according to Defendants.

The Court believes, however, that the Attorneys have standing pursuant to the doctrine of *jus tertii*. That doctrine is explained in *Powers v. Ohio, 499 U.S. 400, 410-411, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991).*

> In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. This fundamental restriction on our authority admits of certain, limited exceptions. n2 We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

(Citations and quotation marks omitted).

n2 It should be noted that one of the cases Defendants cite, *Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir.1993),* alluded to the exceptions of the direct injury requirement. The court stated, "Although the general rule is that a litigant may assert only his or her own rights, the court has recognized an exception to the prohibition against third party standing where certain criteria are met." *Portman* at 902. The *Portman* plaintiff was a terminated public defender who asserted the Sixth Amendment rights of his clients in his attempt to establish standing. The court did not address whether the criteria for third party standing were met in that case because the clients' rights were not ripe. However, the court also stated, "We must emphasize that we express no view as to whether a public defender would have standing to assert the rights of his clients if the clients' claims were ripe." *Id. at 904.*

Thus, Defendants were inaccurate when they alleged that "the Ninth Circuit rejected Portman's claim that he had no standing to assert the Sixth Amendment rights of his clients." (Dfts' Mot. to Dis. at 5). The *Portman* decision was based on ripeness, not standing.

In *Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976),* the Supreme Court applied the *jus tertii* doctrine to hold that the plaintiff doctors had standing to challenge a statute that prohibited Medicaid funding for abortions that were not medically indicated. In the lead opinion, the Court easily determined that the doctors suffered concrete injury by operation of the challenged statute since the doctors had been refused payment for their abortion services and expected future refusals to follow. "If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions." *Id. at 113.*

Next, the *Singleton* Court determined that the rights of women who desired Medicaid-funded abortions was inextricably bound up with the activities of the doctors.

> A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's **[*609]** exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. *See Roe v. Wade, 410 U.S. 113, 153-156, 93 S. Ct. 705, 726-728, 35 L. Ed. 2d 147.* Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.

Id. at 117.

Finally, and with respect to the third *jud tertii* criteria which must be satisfied, the Court found that women faced obstacles in asserting their own rights, including a chilling effect on assertion of their rights in order to protect their privacy. The women also faced imminent mootness to their claims. While acknowledging that such obstacles were not insurmountable, the court held: "But if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Id. at 117-118.*

The Supreme Court has also held that lawyers have *jus tertii* standing to assert the constitutional rights of their clients. In *Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989),* the petitioner attorney's client had all of his assets forfeited because they were found to have been derived from drug-law violations. As a result, the client was unable to pay the petitioner attorney. The Court held that the petitioner had standing to argue that the failure to except attorney fees from the forfeiture statute infringed upon his client's Sixth Circuit rights. It reasoned that the petitioner had a financial stake in the outcome of the case, that the attorney-client relationship is "one of special consequence" and that the statute might have materially impaired the client's ability to exercise his constitutional rights. *Caplin* at 624, n. 3.

Likewise, in *U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990),* an attorney was found to have standing to advance the due process rights of his clients to have legal representation. The statute being challenged in that case was the Black Lung Benefits Act of 1972, which prohibited attorneys from receiving fees for representing claimants without approval of the Department of Labor. Before finding that the attorney had standing, the Court recognized that a litigant ordinarily must assert his or her own legal rights:

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist. *See Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 954-958, 104 S. Ct. 2839, 2845-2848, 81 L. Ed. 2d 786 (1984)* (professional fundraiser given third-party standing to challenge statute limiting its commission to 25% as violation of clients' First Amendment right to hire him for a higher fee). A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle.

Triplett at 720.

Applying this Supreme Court precedent to the facts of this case, the Court finds that the Attorneys' interest in this matter is similar to that of the doctors in *Singleton*. Like the doctors in *Singleton* and the attorney in *Caplin*, the Attorneys assert that they have lost income as a result of the challenged practice and stand to lose more. And, contrary to Defendants' contention, the Attorneys need not prove they have a "legally cognizable injury" in order to have standing, if that term is meant to suggest that a plaintiff must always have a **[*610]** cause of action solely on the basis of his or her own rights. In *Powers, supra.*, the Supreme Court defined the necessary injury as "an injury in fact," meaning that the litigant must have a "sufficiently concrete interest in the outcome of the issue in dispute." *Powers* at 710-711, (citations and quotation marks omitted).

Thus, in *Craig v. Boren, 429 U.S. 190, 194, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976),* the plaintiff bar owner had standing

to assert the constitutional rights of her male customers under the age of 21. She did not allege a cause of action for any violation of her own rights. She alleged that, as a vendor, she was required to carry out the commands of the statute she challenged. Secondly, her failure to obey the statute could lead to sanctions and the loss of her license. The Court held that the plaintiff had standing and stated, "This Court repeatedly has recognized that such injuries establish the threshold requirements of a 'case or controversy' mandated by Art. III. *See, e.g., Singleton v. Wulff, supra, at 113, 96 S. Ct. at 2873* (doctors who receive payments for their abortion services are 'classically adverse' to government as payer) . . . ." *Craig* at 194.

It is significant that the *Craig* court cited the doctors' receipt of payment from the government as establishing the injury requirement of *jus tertii* standing in *Singleton*. Further, neither of the plaintiffs in *Caplin* or *Triplett* were found to have a "legally cognizable injury." Their injuries were their inability to collect the fees they desired. Notably, the *Triplett* court signaled that the loss of fees does not need to be attributable to an existing client. It stated that "[a] restriction upon the fees a lawyer may charge that deprives the lawyer's *prospective* client of a due process right to obtain legal representation falls with [the *jus tertii*] principle." *Triplett* at 720, (emphasis added).

Here, the Attorneys, who are listed as qualified to receive appointments from Michigan courts, receive payment from the State for their services. They have a significant concrete interest in the determination of indigent defendants' entitlement to the appointment of counsel for filing leave to appeal plea-based convictions.

Additionally, the Court finds that the Attorneys meet the second requirement for asserting *jus tertii* standing. The Attorneys have a close relationship to indigent defendants who are denied appellate counsel; and, the Attorneys are the

appellate counsel whose services are being denied. Furthermore, just as a woman cannot safely secure an abortion without a physician, indigent defendants need counsel to effectively present their appellate claims. This truism has been well recognized by the Supreme Court. In *Douglas v. People of State of Cal., 372 U.S. 353, 358, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963),* the Court noted that an indigent without counsel, "where the record is unclear or the errors are hidden, has only the right to a meaningless ritual." Likewise, the *Evitts v. Lucey, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985),* court emphasized that "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."

Thus, just as "the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against" a woman's abortion choice, *Singleton* at 117, a criminal appellate attorney is uniquely qualified to litigate the constitutionality of an indigent defendant's denial of appointed appellate counsel.

Finally, this Court finds that the third *jus tertii* criteria is met, inasmuch as indigent defendants are severely hampered in presenting their own challenges to the Act. As noted above, virtually every lay person needs the assistance of counsel to present a suitable appeal. *Evitts* at 393. This principle surely applies when the appellate issue is the constitutionality of the trial court's denial of appointed **[*611]** counsel for the filing of an application for leave to appeal.

Indeed, this case is distinguishable from *Singleton, Craig* and *Caplin* in a manner that deems the finding of *jus tertii* standing even more appropriate here. In *Singleton*, the Court found that women seeking abortions had obstacles to challenging the statute at issue but noted that those obstacles were not insurmountable. *Singleton* at 117. In his dissenting opinion in *Craig*, Chief Justice Burger noted that "there is here no barrier whatever to Oklahoma males 18-20 years of age

asserting, in an appropriate forum, any constitutional rights they may claim . . . ." *Craig* at 216. Finally, in *Caplin*, the Court found no obstacles to a criminal defendant asserting the Sixth Amendment rights challenged in that case. *Caplin* at 624, n. 3.

In contrast, indigent defendants denied appellate counsel face significant, insurmountable obstacles in bringing their own challenges to the Act. The lack of legal counsel has been recognized repeatedly by the Supreme Court as rendering appeals woefully ineffective, as will be discussed more fully below.

Accordingly, the Court holds that the Attorneys have standing under the doctrine of *jus tertii* to assert the due process and equal protection rights of indigent defendants who plead guilty or nolo contendere.

B. The Standing of the Indigents to Challenge the Act

Plaintiffs state it is only the Attorneys who challenge the Act, and not the Indigents. Therefore, the Indigents' standing to challenge the Act is not an issue. However, in dispute is whether *Younger v Harris* abstention and the *Rooker-Feldman* doctrine deprive the Indigents of standing to challenge the Defendants' practices.

C. *Younger v. Harris* Abstention

In *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, the plaintiff was being prosecuted for violation of a California Criminal Syndicalism Act (the "CCSA") and filed an action in a federal district court to enjoin the prosecution. The district court held the CCSA unconstitutional and restrained the State from further prosecution of the plaintiff. The Supreme Court reversed. In *Zalman v. Armstrong, 802 F.2d 199, 201-202 (6th Cir. 1986)*, the bases for the *Younger* decision was explained as follows:

Younger v. Harris counsels a federal court against interfering with currently pending state criminal proceedings absent a showing of extraordinary circumstances. Underlying this rule are considerations of equity, comity, and federalism. *Younger, 401 U.S. at 43-45, 91 S. Ct. at 750-51.* See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S. Ct. 2718, 2723, 91 L. Ed. 2d 512 (1986).*] The equity component reflects 'the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' *Younger, 401 U.S. at 43-44, 91 S. Ct. at 750.* The comity component reflects 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' *Id. at 44, 91 S. Ct. at 750.* Finally, the federalism component reflects a 'sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' *Id. Younger* is thus designed **[*612]** to "'permit state courts to try state cases free from interference by federal courts,' ... particularly where the party to the federal case may fully litigate his claim before the state court.' *Hicks v. Miranda, 422 U.S. 332, 349, 95 S. Ct. 2281, 2292, 45 L. Ed. 2d 223 (1975)*

(*quoting Younger, 401 U.S. at 43, 91 S. Ct. at 750).*

To determine whether to abstain in a case pursuant to the *Younger* doctrine, there are three factors to consider: "1) whether a state proceeding is pending at the time the federal action is initiated; (2) whether an adequate opportunity is provided to raise the constitutional claims in the state proceeding; and (3) whether there are extraordinary circumstances which nevertheless warrant federal intervention." *Zalman* at 202. However, the *Zalman* court cautioned against mechanical application of those factors. "Indeed, as with any 'rule of law' it is incumbent upon a court to be sensitive to the concerns which animate that rule." *Id.*

1. Pending State Action

Turning to the first factor, Defendants argue that the Indigents all have ongoing criminal proceedings. Plaintiffs Tesmer and Schnell have appealed to the Michigan Court of Appeals. Plaintiff Carter continues to have a right to file a delayed application for leave to appeal. n3 "For purposes of the first requirement, a state prosecution is considered to be pending if as of the filing of the federal complaint not all state appellate remedies have been exhausted." *Mounkes v. Conklin, 922 F. Supp. 1501, 1511 (D.Kan.1996).* Therefore, Defendants argue, that all of the Indigents continue to have pending state actions for purposes of the *Younger* doctrine.

n3 Defendants state that Carter was denied appellate counsel on May 12, 1999 and that Michigan court rules allow delayed applications for leave to appeal for at least 12 months following entry of a final order. MCR 7.205(F)(3) and (F)(4).

Plaintiffs do not challenge Defendants' claim that Tesmer and Carter have pending State proceedings. Accordingly, the Court, finds that the first prong of the *Younger* doctrine is

satisfied and abstention may be required in the cases of Carter and Tesmer if the other two prongs are satisfied.

The Plaintiffs do dispute that Schnell has a pending action. Schnell's application for leave to appeal was denied by the Court of Appeals on April 1, 1999 and his request for rehearing was denied on May 25, 1999.

Under MCR 7.302, a delayed application for leave to appeal to the Supreme Court may not be filed more than 56 days after the Court of Appeals decision. More than 56 days have passed since the Court of Appeals denied Schnell's Motion for rehearing on May 25, 1999. Consequently, the Court finds that Plaintiff Schnell does not have a pending State action. Hence, the Court need not abstain from hearing Schnell's claim.

2. Adequate Opportunity to Raise Constitutional Claims in State Proceeding

Defendants cite *Moore v. Sims, 442 U.S. 415, 425-426, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979),* for the proposition that abstention is required unless a plaintiff shows that state law bars the presentation of his or her claims in the pending state action. They contend that the Indigents have an adequate opportunity to raise their constitutional claims in the State proceedings. Additionally, the Michigan Supreme Court is considering the issues raised in this action in *Bulger*.

Plaintiffs agree that Carter and Tesmer must show that state procedural law bars them from presenting their claims. However, they argue that the State law being challenged in this case precludes them from having a reasonable opportunity to present their claims. In support, they cite Supreme Court cases, such as *Evitts*, where the Court stated that "the services of a lawyer will for virtually every layman **[*613]** be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts* at 393.

Plaintiffs also rely upon *Mata v. Egeler, 383 F. Supp. 1091 (E.D.Mich. 1974).* That case pertained to a Michigan court rule in which the indigent defendant had a right to appeal to the Court of Appeals and to have appointed appellate counsel if he or she filed an appeal within 60 days. However, if the indigent defendant did not appeal within 60 days, the right to appeal was lost, as was the right to appellate counsel. Thereafter, the indigent defendant had a discretionary appeal only, and no right to counsel to perfect his or her application for leave.

Judge James Harvey of this Court granted the plaintiff's application for writ of habeas corpus, reasoning in part:

> 'Meaningful access' to this system is denied indigents: they are forced to travel this route without a vehicle. . . . Mata has not been assisted by counsel at any stage of appeal. Until an attorney scrutinizes the record and prepares argument for appeal, the Court of Appeals does not have an 'adequate basis on which to base its decision to grant or deny review.' Although the state procedure does not completely foreclose petitioner from presenting his claims to the Michigan appellate courts, depriving him of counsel at the initial review, simply because of his indigency, will degrade the entire appellate process to a 'meaningless ritual'.

Mata at 1094.

The Court agrees with Plaintiffs that it is State substantive law that compromises indigent defendants' ability to receive adequate protection from the challenged practice of denying them appellate counsel. The Michigan Court of Appeals has already upheld the constitutionality of the practice of denying the appointment of appellate counsel for the purpose of preparing application for leave to appeal. *People v. Najar, 229 Mich. App. 393, 581 N.W.2d 302 (1998).* Under MCR 7.215

(C)(2), "A published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*." While it is true that the mere fact that the *Najar* court's rejection of another defendant's constitutional claims does not itself suffice to establish that the Indigents are denied an adequate opportunity to present their challenge, in this case, the State law itself defeats indigent defendants' ability to adequately advance their constitutional claims through counsel.

This finding, however, applies only to Carter. In a declaration, he stated that he did not appeal to the Court of Appeals because he did not have a lawyer to represent him and he did not know the law (Plt's Resp. to Mot. to Dis., Exh. A). In contrast, Tesmer did file for leave to appeal. His 38 page Delayed Application for Leave to Appeal Denial of Counsel is attached as Exhibit 1 to Defendants' Motion. He and Schnell appear to be one of many indigent defendants who received the form brief (see Schnell's Br. at Dft's Mot., Exh. 2). Their briefs are identical except that the fill-in-the-blank cover and signature pages include their individual information. Tesmer's lawyerly brief undermines his claim, and this Court is satisfied that Tesmer has had an adequate opportunity to challenge the denial of appellate counsel in the state proceeding. Thus, *Younger* requires abstention in this regard.

3. *Extraordinary Circumstances*

Having made the above findings, Plaintiff Tesmer is the only remaining Plaintiff of the Indigents to whom the "extraordinary circumstances" analysis is meaningful. And, the Court finds that there are no extraordinary circumstances which preclude abstention under the *Younger* doctrine for Tesmer. In *Younger*, the Court cited "bad faith and harassment" and "a statute [that is] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made **[*614]** to apply it" as examples of when abstention may not be justified. *Younger* at

53-54, (citation and quotation marks omitted). Plaintiffs argue that the Act and the challenged practice of the Judges are flagrantly and patently unconstitutional. However, Plaintiffs' cite no cases which support this contention. There may be none, because the exception is interpreted to be so narrow.

> The requirement that a statute must be unconstitutional in every 'clause, sentence and paragraph, and in whatever manner' it is applied, demonstrates that this exception to *Younger* abstention is very narrow. The refusal to apply the exception in the *Younger* case, itself, illustrates the narrowness of this exception: in *Younger*, the federal plaintiff could not bring himself within this exception even though the statute under which he was indicted--the California Criminal Syndicalism Act--had been effectively invalidated the previous year in *Brandenburg v. Ohio, 395 U.S. 444, 449, 89 S. Ct. 1827, 1830, 23 L. Ed. 2d 430 (1969) (overruling Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)). Younger, 401 U.S. at 40-41, 91 S. Ct. at 748-749.*

Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles, 23 F.3d 218, 225 (9th Cir. 1994).

Further, Plaintiffs have not shown that Tesmer faces great and immediate irreparable injury, which is required in order for there to be a finding of extraordinary circumstances. *See Zalman* at 205, n. 8. The *Younger* Court stressed that requirement.

> In view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is both great and immediate. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal

> prosecution, could not by themselves be considered irreparable in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Younger at 46.

Tesmer makes no showing that he faces threat of injury that is greater than any other criminal defendant facing prosecution who, in the context of that litigation, alleges a violation of federally protected rights. Therefore, even if the Act and practice of the Judges are flagrantly unconstitutional, extraordinary circumstances do not exist to interfere in the State court proceedings involving Tesmer.

4. Conclusion Regarding Younger Abstention

The Court concludes that the *Younger* doctrine does not bar the Attorneys or Schnell from pursuing this case because they do not have any pending State actions. Further, Carter has not had an adequate opportunity to challenge the practice and State law that led to the denial of his request for appellate counsel. Without counsel, Carter's appeal of that decision would have been a "meaningless ritual." Finally, no extraordinary circumstances exist which would allow the Court to interfere in the State court action pending with respect to Tesmer.

D. The *Rooker-Feldman* Doctrine

The general rule established by *Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149,* (1923) and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983)* is that federal district courts do not have appellate jurisdiction over State court decisions. District courts are vested only with original jurisdiction. *Rooker* at 415-416; *Feldman* at 482-486.

> This rule arises from the interplay of two jurisdictional statutes: *28 U.S.C. § 1331*, which grants district courts original jurisdiction over 'civil actions arising under' federal law, and *28 U.S.C. § 1257*, which grants the Supreme Court the right to review 'final judgments ... **[*615]** rendered by the highest court of a State.' This rules applies even when the state court judgment is not made by the highest state court, *Worldwide Church of God v. McNair, 805 F.2d 888, 893 n. 3 (9th Cir.1986)*, and when the challenge to the state court's actions involves federal constitutional issues. *Feldman, 460 U.S. at 484-86, 103 S. Ct. at 1316-17.*

Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles, 23 F.3d 218, 221 (9th Cir.1994).

Defendants argue that, under the *Rooker-Feldman* doctrine, this Court lacks jurisdiction to review the merits of the State court decisions denying the Indigents' requests for appellate counsel.

There is, however, an important exception to the *Rooker-Feldman* doctrine, which was explained in *Dubinka* as follows:

> Although a federal district court does not have jurisdiction to review constitutional challenges to a state court's decision, the court does have jurisdiction over a general constitutional challenge that does not require review of a final state court decision in a particular case. [*Feldman*] *460 U.S. 462, 482-86, 103 S. Ct. 1303, 1314-17, 75 L. Ed. 2d 206;* [*Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986)]*. 'This distinction between a permissible general constitutional challenge and an impermissible appeal of a state court determination may be

> subtle, and difficult to make.' *McNair, 805 F.2d at 891* (citations omitted).
>
> In analyzing whether federal district courts have jurisdiction to hear a particular constitutional challenge, we must determine whether the constitutional claims are 'inexplicably intertwined' with the state court's rulings in a particular plaintiff's state case. *Feldman, 460 U.S. at 483-84 n. 16, 103 S. Ct. at 1315-16 n. 16* (stating that 'if the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision'); *see also McNair, 805 F.2d at 892*. Courts have generally concluded that claims are inextricably intertwined when the district court must scrutinize both the challenged rule and the state court's application of that rule.

Dubinka at 221-222.

Here, the Indigents request that the Court consider the constitutionality of the State court's general practice of denying appellate counsel following plea-based convictions. The particularities of their cases are not at issue. While Plaintiffs in their Complaint cite the specific dates and judges who denied them appellate counsel, resolution of Plaintiffs' claims only requires the Court to scrutinize the challenged rule, not the state court's application of that rule to any individual Plaintiff's case. Plaintiffs' constitutional claims are, therefore, not inextricably intertwined with the state court's denial of appointed counsel to these Plaintiffs and the *Rooker-Feldman* doctrine does not apply. *Dubinka* at 221-222.

* * *

Thus, the Court finds that the Attorneys have standing and, further that this Court has jurisdiction to hear the constitutional challenge brought by the Indigents. However, this holding is limited to Carter and Schnell, since the *Younger* doctrine applies to Tesmer. Finally, since the Attorneys did not have a State proceeding, the *Rooker-Feldman* doctrine does not apply to them, and they may proceed in this action.

E. The Proper Defendants

Defendants argue that there are no proper Defendants in this case. They argue that the Eleventh Amendment bars suit against the Attorney General in her official capacity. n4 Nor does *Ex Parte* **[*616]** *Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908),* apply to Plaintiffs' request for injunctive relief against the Attorney General, Defendants argue.

> Under *Young*, individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. . . .
>
> Courts have not read *Young* expansively. Young does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute.

Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1414-1415 (6th Cir. 1996) (citations omitted).

n4 Defendants also argue that the Attorney General cannot be sued in her personal capacity. This argument is not reviewed in this memorandum because Plaintiffs filed suit against the Attorney General only in her official capacity and they do not argue in response to Defendants' Motion that she is personally liable.

Defendants allege that the Attorney General has no relation to the Act and will have absolutely nothing to do with enforcing it. The Court agrees with Defendants.

The enforcement of the Act is not a law enforcement or prosecutorial function. The Act is directed at the trial court. The Court sees no indication that the prosecutor has any input into the trial court's consideration of the merits of appointing counsel. The hypothetical chance that the Attorney General could file an application for superintending control over a trial court which violates the Act, as Plaintiffs suggest might happen, is far afield from the requirement that the state official being sued have threatened to enforce the challenged statute. The Attorney General is not a proper party.

However, the Court finds that the Judges and the putative class of Circuit Court Judges are proper Defendants. They are the State officials charged with enforcing the Act. That they will be enforcing the Act is clear; a March 28, 2000 amendment to Michigan Court Rules 6.302, 6.425 and 6.615 and the adoption of Michigan Court Rule 6.625, are all aimed at implementing the Act (See Exh. A of Plts' Supp. Auth.).

Whether the Judges are neutral adjudicators, as Defendant suggest, or acting in an administrative capacity, when they consider the appointment of counsel, as Plaintiffs contend, is not of any consequence for purposes of this action.

Regardless of the characterization of the role they play when denying appellate counsel to indigent defendants, the Judges are proper parties. This finding is supported by *Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984),* a case with striking parallels to the instant one. In *Pulliam*, a magistrate judge jailed two defendants who could

not post bail even though they were arrested for non-jailable misdemeanors. Afterwards, the defendants filed a § 1983 claim against the magistrate, seeking declaratory and injunctive relief. They claimed that the magistrate's practice of requiring bond for nonincarcerable offenses violated the due process and equal protection clauses. The trial court agreed and enjoined the practice.

On appeal to the Supreme Court, the issue concerned, in relevant part, "the scope of judicial immunity from a civil suit that seeks injunctive and declaratory relief under § 1 of the Civil Rights Act of 1871 . . . ." *Pulliam 466 U.S. at 524.* After an exhaustive review of English and American law, the Court held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam 466 U.S. at 541-542.* Moreover, the Court emphasized that § 1983 was intended to reach unconstitutional actions of judges. The Court cited *Pierson v. Ray, 386 U.S. 547, 558-564, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967),* as standing for the proposition that "every Member of Congress who spoke to the issue assumed that **[*617]** judges would be liable under § 1983." *Pulliam 466 U.S. at 540.*

> Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges. In *Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1880),* § 4 of the Civil Rights Act of 1875, 18 Stat. 336, was employed to authorize a criminal indictment against a judge for excluding persons from jury service on account of their race. The Court reasoned that the Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the equal protection of the laws. **Since a State acts only by its legislative, executive, or judicial authorities, the constitutional provision must be addressed to**

> **those authorities, including the State's judges.** Section 4 was an exercise of Congress' authority to enforce the provisions of the Fourteenth Amendment and, like the Amendment, reached unconstitutional state judicial action.
>
> The interpretation in *Ex parte Virginia* of Congress' intent in enacting the Civil Rights Acts has not lost its force with the passage of time. In *Mitchum v. Foster*, supra, the Court found § 1983 to be an explicit exception to the anti-injunction statute, citing *Ex parte Virginia* for the proposition that the 'very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."' *407 U.S. 225, 242, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705.*
>
> Much has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation. We remain steadfast in our conclusion, nevertheless, that **Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review.**

Pulliam 466 U.S. at 540-541. (emphasis supplied)

Like the jailed defendants in *Pulliam*, the Indigents are suing under § 1983, asserting that the Judges' practices violate their due process and equal protection rights. In light of

Pulliam, Defendants' argument that the Judges are not proper Defendants in this case cannot be sustained. Furthermore, *Pulliam's* emphasis on the fact that § 1983 was intended to be an independent protection for federal rights undermines Defendants' claim that an indigent defendant's only recourse is to appeal the denial of appellate counsel and, when those appeals are exhausted, file a petition for writ of habeas corpus.

In addition, the Court believes that the Judges are proper Defendants because of their role as enforcers of a common law rule which precludes indigent defendants from being assigned appellate counsel after plea based-convictions, and as enforcers of the Act, soon to take effect. The Supreme Court has held that, when judges act as enforcers, they are subject to § 1983 suits for injunctive or declaratory relief.

> If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley v. Fisher, 80 U.S. 335, 13 Wall. 335, 20* **[*618]** *L. Ed. 646 (1872),* we have held that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial

immunity bars declaratory or injunctive relief; we have not addressed the question.

We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.

Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975),* is only one of a myriad of such cases since *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),* decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.

Supreme Court of Virginia v. Consumers Union of U. S., Inc., 446 U.S. 719, 734-737, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980)(citations omitted).

Under the Act, Michigan's circuit court judges will be solely responsible for enforcing the laws regarding the appointment of appellate counsel to indigent defendants who have pled guilty or nolo contendre. If the circuit court judges cannot be sued for relief, putative Plaintiffs would have to await the institution of state-court proceedings against them and the denial of appellate counsel in order to assert their federal constitutional claims. "This is not the way the law has developed, and, because of [their] own inherent and statutory enforcement powers, immunity does not shield the [the Judges] from suit in this case." *Supreme Court of Virginia* at 737.

Accordingly, the Court holds that the Judges and the putative class of Michigan circuit court judges are proper Defendants in this case.

F. Available Relief Against the Judges

In this 42 USC § action Plaintiffs' request both declaratory and injunctive relief. However, injunctive relief against the Judges is not available. Following the decision in *Pulliam*, § 1983 was amended to provide that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Since no declaratory decree has been violated and declaratory relief is available, the Court cannot enter an injunction against the Judges. However, under the plain wording of *42 USC § 1983,* declaratory relief against judicial officers is clearly available if the circumstances warrant such relief.

G. Declaratory Judgment

The Court finds that both the challenged practice of denying appellate counsel to indigent defendants who plead **[*619]** guilty or nolo contendere, as well as the Act, violate the United States Constitution.

The Supreme Court has held that denial of counsel on appeal to an indigent amounts to invidious discrimination. The starting point of the analysis was the Court's finding that "[a] State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas v. People of State of Cal., 372 U.S. 353, 354, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963).* Applying that general rule, the Court found that "there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." *Id.*, (citation and quotation marks omitted).

In *Douglas*, the State court denied the defendants' requests for counsel after determining that no good would be served by the appointment of counsel. The state court acted pursuant to a State statute that allowed the court to review the record and determine whether appellate counsel would be helpful. The Supreme Court rejected that approach.

> In spite of California's forward treatment of indigents, under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges upon whether o. not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion

on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required.

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike (Cal.Penal Code § § 1235, 1237), from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction (see Cal.Const., Art. VI, § 4c; Cal.Rules on Appeal, Rules 28, 29), or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Douglas at 355-357, (citations omitted).

The *Douglas* court further emphasized that an indigent who is required to defend himself is rendered utterly defenseless.

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened **[*620]** by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Douglas at 357-358.

The *Douglas* decision was followed by *Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).* The *Ross* court distinguished its case from *Douglas* and held that North Carolina was not required to appoint counsel to file a discretionary appeal to the State's highest court or to the U.S. Supreme Court. In so holding, the Court emphasized in three instances that the defendants in that State were appointed counsel for their appeals to the intermediate appellate court.

> The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.' *Douglas v. California, 372 U.S. at 356, 83 S. Ct. at 816.* We do not believe that it can

> be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

Ross at 614-615.

> Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.

Id. at 615.

> An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*.

Id. at 616.

In *Mata, supra,* discussed earlier, this court applied *Douglas* and *Ross* to hold a portion of Michigan's then existing appellate rules unconstitutional. The rules deemed first appeals to the Court of Appeals to be as of right so long as they were requested within 60 days. Indigent defendants who timely filed requests for appeal were entitled to the appointment of appellate counsel. Anyone failing to request appeal within 60 days lost his or her right to appeal but could file for leave to appeal. Additionally, the right to appointed appellate counsel for indigents was lost when the request for appeal was untimely. The *Mata* petitioner did not file his request to appeal timely and, therefore, his request for appointed appellate counsel was denied.

[*621] Despite the fact that the petitioner's appeal to the Court of Appeals was discretionary, the *Mata* court distinguished its case from *Ross*. Unlike in *Ross*, where the defendants had already received appellate counsel during the intermediate appeal, the *Mata* petitioner had "not received the assistance of counsel at any stage of the appellate process." *Mata* at 1093. No attorney had scrutinized the record and prepared an argument for appeal. *Mata* at 1094. The court continued:

> It is 'invidious discrimination' for the Michigan Court of Appeals to consider the merits of an indigent's first late appeal without benefit of counsel while allowing a rich man to employ counsel. The 'relative handicap' Michigan indigents face when applying for leave to appeal is even greater than the handicap petitioners faced in *Douglas*. There, the California appellate court independently examined the record before

concluding that 'no good whatever could be served by appointment of counsel.' *372 U.S. at 355, 83 S. Ct. at 815.* Here, the only person examining the record for possible errors is petitioner-- an indigent untrained in law. Furthermore, Mata's appeal is discretionary rather than as of right; if he fails to persuade the Court of Appeals his case has merit, he will not receive his first appeal, as petitioners in *Douglas* would have. **While one can distinguish the principal case from *Douglas*-- the appeal in the principal case is discretionary, whereas in Douglas it was as of right-- in the context of the Michigan appellate system, this is a distinction without a difference.** Whether the appeal is as of right or discretionary is irrelevant if 'indigents are . . . denied meaningful access to that system because of their poverty.' *Ross v. Moffit, 417 U.S. at 611, 94 S. Ct. at 2444, 41 L. Ed. 2d at 351.*

Mata at 1093-1094. (emphasis supplied)

Consistently with the *Mata* court, the Court holds that the practice of the Judges and similarly situated judicial officers, which denies appellate counsel to indigent defendants with plea-based convictions, is unconstitutional. Such practice, codified in the Act slated to soon take effect, is unconstitutional for the same reasons. Defendants emphasize that the *Douglas* and *Ross* Courts distinguished between appeals of right and discretionary appeals. However, in holding that a State need not appoint appellate counsel for a discretionary appeal to the State's highest court, the Supreme Court could not have been more clear that that distinction was based upon the fact that an attorney had been appointed at the intermediate level, had reviewed the record and had prepared the appellate arguments. Without that initial review by an

attorney, the indigent defendant's appeal was a meaningless ritual.

The Supreme Court also made clear in *Douglas* and *Ross* that, when a rich man is given a meaningful opportunity to appeal while a poor man is given only a meaningless ritual, that is invidious discrimination.

Defendants stress the fact that the indigent defendants who are denied appellate counsel have pled guilty. The implication is that, by admitting guilt, the indigent defendants do not need to have a meaningful appeal available to them. The Court rejects this argument. An illustration of the serious injustice that could occur when an indigent defendant who has pled guilty is denied appellate counsel was described in *Mata*.

> At the Center for Forensic Psychiatry in Ann Arbor, Michigan, three doctors examined Mata for nearly two months before concluding he was incompetent to stand trial. Despite this report, the trial judge accepted a local doctor's conclusion of competence that was based on an hour and fifty-minute interview with Mata. In addition to maintaining he was incompetent to stand trial, petitioner argues with some force that he received incompetent assistance of counsel. Assuming *arguendo* these contentions have merit, petitioner's only chance for justice **[*622]** within the Michigan legal system rests on his obtaining an effective appeal.

Mata at 1094.

Therefore, the fact that the indigent criminal defendants at issue have or will have pled guilty or nolo contendere does not justify the policy of denying them a meaningful appeal.

IV. Conclusion

For the above reasons, the Court finds that the attorneys have established *jus tertii* standing; that *Younger* requires abstention with respect to Tesmer's claim only, and not the other Indigents or the Attorneys; that the *Rooker-Feldman* doctrine is applicable; that the Attorney General is not a proper Defendant, but the Judges and the putative class of circuit court judges are. These findings result in Defendants' Motion to Dismiss being granted in part and denied in part.

Further, for the reasons stated above, this Court is prohibited from enjoining the Judges and the putative class of circuit court judges by operation of § 1983. Hence, Plaintiffs' Motion for Preliminary Injunction is denied.

Finally, this is a proper case for entry of a Declaratory Judgment under Fed. R. Civ. P. 57 and *28 U.S.C. § 2201.* Accordingly:

1. The practice of the Judges and other similarly situated State of Michigan circuit court judges, of denying appointed counsel to aid indigents seeking leave to appeal their plea-based felony conviction or nolo contendere, is declared to be in violation of equal protection and due process requirements of the United States Constitution; and

2. P.A. 1999, No. 200, which codifies the above practice, is declared to be in violation of equal protection and due process requirements of the United States Constitution.

IT IS SO ORDERED.
/S/
Victoria A. Roberts
United States District Judge

Dated: 3/31/00

UNITED STATES DISTRICT COURT
For The EASTERN DISTRICT Of MICHIGAN,
NORTHERN DIVISION

CASE NO. 00-CV-10082

114 F. Supp. 2d 622; 2000 U.S. Dist. LEXIS 17060

JOHN CLIFFORD TESMER, CHARLES CARTER and ALOIS SCHNELL, on behalf of themselves and all similarly situated individuals, and ARTHUR M. FITZGERALD and MICHAEL D. VOGLER, Plaintiffs,

v.

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE and JUDGE LYNDA HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, Defendants,

June 30, 2000, Decided
June 30, 2000, Filed

Judges: Hon. Victoria A. Roberts, United States District Judge.

[*624]

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR INJUNCTION AND DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

I.

This matter is before the Court on Plaintiffs' Motion for Injunction filed May 9, 2000, and Plaintiffs' Motion for Class Certification, filed March 30, 2000. Plaintiffs request that the Court issue an injunction to enforce its prior declaratory judgment, which held that the denial of appellate counsel to indigents who have pled guilty or nolo contendere is unconstitutional. Additionally, they ask this Court to certify a class of circuit court judges similarly situated to the named Defendants. The parties have filed briefs, and, on Wednesday, June 28th, 2000, the Court heard argument. For the reasons explained below, Plaintiffs' Motion is **GRANTED**. Additionally, Judge Kolenda and all other similarly situated non-party judicial officers are bound by the present injunction, Fed. R. Civ. P. 65(d). Accordingly, Plaintiffs' Motion for Class Certification is **DENIED.**

II.

As a preliminary matter, this Court must consider whether it has jurisdiction to consider Plaintiffs' Motions. Defendants question the Court's authority in light of the fact that they have appealed the prior order to the Sixth Circuit Court of Appeals. Plaintiffs argue that Defendants have appealed an order that does not exist, inasmuch as their appeal concerns an "injunction," and this Court only entered a declaratory judgment. Because they claim the appeal is invalid, they encourage the Court to find jurisdiction.

The Court is mindful of the fact that an appeal generally divests the district court of jurisdiction over those aspects of the case which are involved in the appeal. *Griggs v. Provident Consumer* **[*625]** *Discount Co., 459 U.S. 56, 58, 74 L. Ed. 2d 225, 103 S. Ct. 400 (1982).* However, *Griggs* is "not an inflexible rule." *Cochran v. Birkel, 651 F.2d 1219, 1223 (6th Cir. 1981).* For example, a district court may proceed where "the order from which the appeal is sought is itself clearly nonappealable," *id. at 1222,* or "manifestly deficient." *Id. at 1222* (quoting *Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.*

1972). As such, there is reason to believe that the Court retains jurisdiction under the present circumstances.

Nonetheless, the Court finds it may assert jurisdiction without deciding whether Defendants' appeal meets the standards established in *Griggs*. The Court has the power to proceed with Plaintiff's Motions under the Declaratory Judgment Act, *28 U.S.C. § 2202.* That act allows the Court to grant "further necessary or proper relief based on a declaratory judgment . . . against a party whose rights have been determined by judgment." *28 U.S.C. § 2202.* Since Plaintiffs' rights have been determined in this Court's prior Order, this Court may continue to grant such relief as necessary to protect those rights.

III.

On March 31, 2000 this Court issued an Opinion and Order (1) Granting in Part and Denying in Part Defendants' Motion to Dismiss, (2) Denying Plaintiffs' Motion for Preliminary Injunction; and (3) Granting Plaintiffs' Request for Declaratory Judgment. At issue before the Court was the constitutionality of P.A. 1999, No. 200 ("the Act") and the practice of some Michigan judges of denying appellate counsel to indigents who have pled guilty or nolo contendere, for the purpose of preparing applications for leave to appeal their plea based convictions and sentences. The Court declared, in no uncertain terms, that the denial of counsel in such cases rendered an indigent defendant's appeal a meaningless ritual and was, therefore, unconstitutional. *See March 31st Opinion and Order* at 33-39. It specifically stated that the Act denied equal protection and due process to indigent defendants and similarly declared the challenged practices "of the judicial officer Defendants and other similarly situated state circuit court judges" unconstitutional.

Despite the March 31st Opinion and Order declaring the Act and practice unconstitutional, Defendant Heathscott

continues to refuse to appoint appellate counsel to indigents who have pled guilty. Defendant Heathscott relies on her stated obligation to follow M.C.R. 6.425, a newly enacted Michigan Supreme Court rule designed to implement the Act that this Court declared unconstitutional. n1 Further, at oral argument, counsel for Judge Heathscott argued that Judge Heathscott had not violated this Court's declaration with respect to Plaintiffs, and that she was only failing to appoint counsel to criminal defendants who are not parties to this action.

> n1 The Michigan State Supreme Court Rule came to the Court's attention by way of Plaintiffs' supplemental brief, submitted March 27, 2000..

Additionally, Judge Dennis Kolenda refuses to appoint appellate counsel, relying upon the fact that he was not a party to the original action. Judge Kolenda does concede that he had notice of this Court's Declaratory Judgment. (Plaintiffs' Motion for Issuance of an Injunction, at 4, citing Judge Kolenda's opinion in *People v. Hill*, No. 99-12376-FH (Kent Cir. Ct. Apr. 24, 2000)).

For the reasons stated below, the Court grants Plaintiffs' Motion for Injunction against Judge Heathscott. *28 U.S.C. § 2202; 42 U.S.C. § 1983;* Fed. R. Civ. P. 65. Additionally, the Court cautions that Judge Kolenda and all other similarly situated non-party judicial officers are also bound by the present injunction. Under Fed. R. Civ. P. 65 (d), an injunction is binding not only on the parties to the action, but also upon "those persons in active participation with them who receive actual notice of the order by personal service or otherwise." Thus, the Court finds it unnecessary to grant Plaintiffs' request to certify a class of circuit court judges similarly situated to the named Defendants.

III.

Plaintiffs request that the Court issue an injunction against both Judges Heathscott and Kolenda, and further request that the Court grant their Motion to Certify a Class of circuit court judges similarly situated with respect to the named Defendants. The Court addresses each argument in turn.

A.

Upon review of the actions of Defendant Heathscott, the Court finds that a § 1983 injunction is appropriate. The authority to grant injunctive relief is conferred by *42 U.S.C § 1983,* which could not be clearer that such relief is available once a declaratory decree has been violated. Additionally, the Declaratory Judgment Act, *28 U.S.C. § 2201 et seq.*, allows this court to grant "further necessary or proper relief based on a declaratory judgment . . . against a party whose rights have been determined by judgment." *28 U.S.C. § 2202.* Although injunctive relief against a state Court Judge is rarely awarded, "there is no immunity bar to such relief, and in situations where, in their judgment, an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted relief." *Pulliam v. Allen, 466 U.S. 522, 537, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984).* In particular, "when no state proceeding is pending, the considerations of equity, comity and federalism are [] diminished, [and] a federal court may . . . grant declaratory and injunctive relief." *WXYZ, Inc. v. Hand, 658 F.2d 420, 423 (6th Cir. 1981)* (citing *Steffel v. Thompson, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974)); Wooley v. Maynard, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977).*

While this Court, as many other federal courts, is reluctant to interfere with the functions of a state court, there is no state court action pending which would determine the constitutionality of the Act. *See* Plaintiffs' Supplemental Authority, Concurring Opinion of Corrigan J. ("The constitutionality of *1999 P.A. 200* is not before us in *[People*

v.] Bulger."). Meanwhile, Judge Heathscott continues to act "under color of [a] regulation . . . in [subjecting persons] to the deprivation of . . . rights . . . secured by the Constitution . . . ." *42 U.S.C. § 1983.* She does not contest that she continues to fail to appoint counsel to indigent criminal defendants who have entered guilty or nolo contendere pleas, contrary to this Court's declaration that such a practice violates the equal protection and due process requirements of the United States Constitution.

Further, while Defendant Heathscott apparently claims she is merely following a court rule that was not examined by the Court when it issued its March 31st Order, this argument does not immunize her actions. The Michigan court rule upon which she relies, M.C.R. 6.425, is specifically designed to implement the Act that this Court's Order clearly declared unconstitutional. *See Order* at 3 ("Additionally, the Court declares that *1999 P.A. 200* . . . is unconstitutional in that it denies equal protection and due process to indigent individuals who have pleaded guilty or nolo contendere."); *see also* Objections to implementation of court rules by Justices Cavanagh and Kelly, attached to Plaintiffs' Supplemental Authority (criticizing the Michigan Supreme Court's rush to amend the court rules to reflect the standards proposed in the Act). As such, the Michigan court rule conflicts with federal law and is "without effect" under the Supremacy Clause of the United States Constitution. n2 U.S. Const. art. VI; *McCulloch v.* **[*627]** *Maryland, 17 U.S. (4 Wheat.), 316, 4 L. Ed. 579 (1819)* (any state law that conflicts with federal law is "without effect."). Defendant Heathscott, therefore, cannot shield her actions from review by relying on a state procedural rule that indisputably conflicts with federal law. n3

> n2 The Court notes that this is not a situation where a state court has made its own independent review of the constitutional questions decided by this court. As such, there is no claim made that Judge Heathscott is not bound in light of the parallelism between state courts and lower federal courts. *See Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992)* ("'In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position.").
>
> n3 Further, under the authority of *28 U.S.C. § 2202,* this Court also clarifies that its declaratory judgment extends to all procedural rules designed to implement the statute declared unconstitutional.

Additionally, the Court is troubled by the disingenuous arguments made by Judge Heathscott to insulate herself from the clear remedial provisions set forth in § 1983 against judicial officers. In reviewing those same provisions, the United States Supreme Court found no indication of affirmative congressional intent to insulate judges from the reach of the remedy Congress provided in 1983. *Pierson v. Ray, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967).* As the High Court has further explained:

> Congress enacted 1983 . . . to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. . .
>
> Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges.

Pulliam, 466 U.S. at 540 (internal quotations and citations omitted). While the Court acknowledged that "much has changed since the Civil Rights Acts were passed," *id.*, it also stated:

> We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common- law doctrine of judicial immunity to insulate state judges completely from federal collateral review.

Id. at 541.

The Court is mindful of Defendant's argument that it should act with restraint. However, the Court cannot shirk its obligation to exercise its jurisdiction on behalf of litigants to assure their right to due process and the equal protection of the laws. "The very purpose of section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action, under the color of state law, whether that action be executive, legislative or judicial." *Id.* (quoting *Mitchum v. Foster, 407 U.S. 225, 242, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972)).* This Court will do precisely that, even though the result may be to enjoin a state court judge, or even to hold her in contempt for continued violations. *Pulliam, 466 U.S. at 538 n. 19.*

B.

The Court also finds that Judge Kolenda is bound by this injunction, in spite of the fact that he was not a named party in the original declaratory decree. "A court may bind non- parties to the terms of an injunction or restraining order to preserve its ability to render a judgment in a case over which it has jurisdiction." *United States v. Paccione, 964 F.2d 1269, 1274-*

75 (2nd Cir. 1992). Indeed, Fed. R. Civ. P. 65(d) specifically provides that an injunction is binding "upon those persons in active concert or participation with [the parties] who receive actual notice of the order . . . ." Fed. R. Civ. P. 65(d) extends to those who participate with the named defendants even where the non-parties "were independently motivated." *New York State Nat'l Organization for Women v.* **[*628]** *Terry, 961 F.2d 390, 397 (2d Cir.1992), vacated on other grounds, 507 U.S. 901 (1993).*

In the present case, it is undisputed that Judge Kolenda received actual notice of the March 31st Opinion and Order, as he specifically cited it to it and stated his disagreement with it. See Exhibit B to Pl's Motion for Injunction. Further, in finding that the criminal defendant was not entitled to appellate counsel, Judge Kolenda participated with the named Judges who adopted the practices declared unconstitutional by this Court, even as he cited his own independent motivations for doing so. As such, the Court finds it necessary to bind Judge Kolenda by means of an injunction to preserve its prior Order.

Further, the Court concludes that it may validly issue a § 1983 injunction against Judge Kolenda even though he was not a party to the original action. The 1996 amendments to § 1983 indicate that an injunction may issue against a judicial officer when "a declaratory decree was violated . . . ." *42 U.S.C. § 1983.* In the present case, Plaintiffs obtained a declaratory decree, and its terms were violated by Judge Kolenda. As such, it appears that Plaintiffs are entitled to an injunction against him.

In so concluding, the Court is mindful that the issue of whether an injunction can issue with respect to those judicial officers not parties to the prior declaratory decree, is not clear cut. The statute is somewhat vague, the legislative history is ambiguous and the issue appears to be one of first impression. However, following the general rules of statutory construction, the Court notes that the plain language of the statute requires

only "a" declaratory decree. Had Congress intended to require plaintiffs to obtain a separate declaratory decree with respect to each judicial officer against whom an injunction was sought, it could have easily specified as much. In particular, Congress could have easily stated that injunctive relief should not issue unless a judicial officer violated a declaratory decree against him/her.

Further, the Court finds that simply requiring one declaratory decree best enforces the purposes *42 U.S.C. § 1983*. As explained *supra*, § 1983 was intended to prohibit state courts from being used to deprive individuals of their federal rights. It was intended to interpose the federal courts between the states and the people, as guardians of the people's federal rights. Moreover, the Supreme Court has consistently held that Congress did not intend to immunize judicial officers. Thus, once a state judicial practice is declared unconstitutional, such declaratory decree should serve as a basis for injunctive relief against any judicial officer violating its provisions. To rule otherwise would potentially require individuals like Plaintiffs to file numerous suits for declaratory decrees against several judges on the same issue, or to seek to amend their complaints repeatedly each time another judicial officer violated the terms of a decree. It would, therefore, require a significant expenditure of time and resources, and would impose a significant burden on efforts to protect against deprivations of constitutional rights. Thus, while the Court is concerned with comity and respects the ability of state judges to pass on federal constitutional questions, it concludes that the balance of considerations in the present case weighs in favor of requiring only "a" declaratory decree.

C.

Plaintiffs additionally urge this Court to consider their Motion for Class Certification, since Judge Kolenda relies upon this Court's failure to certify a class as a justification for not following the Order. As an initial matter, the Court would

expect that Judge Kolenda and other state court judges would refrain from engaging in their own analysis, since this Court's prior Order specifically declared unconstitutional the "practice of the Judges and other similarly situated State of Michigan **[*629]** circuit court judges . . . ." *March 31st Opinion and Order* at 2, 40. While the Court stopped short of formally certifying the class of circuit judges under Fed. R. Civ. P. 23, the decision clearly indicated the Court's inclination to do so.

At the present time, however, the Court declines Plaintiffs' request to certify the class. As the Court noted earlier, this matter is now on appeal. While the Court recognizes its authority to enforce its declaratory decree, it is not yet satisfied that certifying a class constitutes enforcement, as opposed to expansion, of its prior Order. Further, the Court again notes that under Fed. R. Civ. P. 65(d) any non-party who acts in "concert or participation with [the parties]" and who receives actual notice of this injunction, is bound by its terms. Between the specific language of this Court's March 31st Opinion and Order, and the language of Rule 65(d), the Court is hopeful that all other non-party judges will abide by its ruling unless and until it is overturned by a higher federal court. As such, the Court concludes that further relief in the form of class certification is not warranted.

IV.

It is unfortunate that the defiance of certain state court judges has led to the need for this request for extraordinary relief against judicial officers. The paucity of cases addressing the issues set forth in Plaintiff's Motion suggests that the overwhelming majority of judges do abide by federal court orders that are designed to enforce the United States Constitution. The state judges who choose to enforce statutes declared to be unconstitutional should appreciate that their acts of defiance will certainly carry costs, not the least of which is the erosion of respect among parallel courts. If necessary, the Court will not hesitate to *sua sponte* certify a class of state

circuit judges if is later satisfied that such action is necessary to further enforce the March 31st Opinion and Order. *Barrientos v. Nichter, 76 F. Supp. 2d 510, 516 (S.D.N.Y. 1999)* ("District courts may rule on class certification sua sponte."); *McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir.1981); see also Shipp v. Tennessee Dept. of Employment Security, 581 F.2d 1167, 1169 (6th Cir. 1978)* (noting that the district court did not certify the class sua sponte).

Therefore, for all of the reasons stated above, and under the authority of *42 U.S.C. § 1983, 28 U.S.C. § 2202,* and Fed. R. Civ. P. 65, this Court enjoins Judge Lynda L. Heathscott and Judge Dennis C. Kolenda from violating this Court's Order of March 31, 2000; clarifies that such order pertains to all court rules, regulations or procedures designed to implement the Act declared to be unconstitutional; clarifies that such order prohibits all state court judicial officers from taking any action whatsoever to enforce or implement the Act; and states that this Order shall have binding effect upon other such non-party judicial officers who participate in the practice declared unconstitutional and who receive notice of this Order, including Judge Kolenda.

IT IS SO ORDERED.

HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

dated: JUN 30 2000

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

Federal:

US Const., Amend. 14, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 1331:
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC § 1343:
(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 USC § 1983:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

- **Michigan:**

Michigan Constitution of 1963:
Mich Const 1963, art 1, § 20, Rights of accused in criminal proceedings:
In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so

orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Michigan Compiled Laws:

MCL 770.3(1) 770.3 Appeal by aggrieved party.
(1) Subject to the limitations imposed by section 12 of this chapter and except as provided in section 16, an aggrieved party shall have a right of appeal from a final judgment or trial order as follows:

(a) Except as otherwise provided in subdivision (d), in a felony or misdemeanor case tried in the circuit court, there shall be a right of appeal to the court of appeals.
(b) Except as otherwise provided in subdivision (d), in a misdemeanor or ordinance violation case tried in a municipal court in a city that adopts a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, or tried in the district court, there shall be a right of appeal to the circuit court in the county in which the misdemeanor or ordinance violation was committed.
(c) In a misdemeanor or ordinance violation case tried in a municipal court in a city that does not adopt a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, there shall be a right of appeal as provided in chapter XIV.
(d) All appeals from final orders and judgments based upon pleas of guilty or nolo contendere shall be by application for leave to appeal.

* * *

(6) Further review of any matter appealed to the court of appeals under this section may be had only upon application for leave to appeal granted by the supreme court.

* * *

MCL 770.3a Defendant pleading guilty, guilty but mentally ill, or nolo contendere; appointment of appellate counsel.

(1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.

(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:

(a) The prosecuting attorney seeks leave to appeal.

(b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the

defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Michigan Court Rules:

MCR 6.005 Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings.

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all subsequent court proceedings, and

(2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent. The determination of indigency must be guided by the following factors:

(1) present employment, earning capacity and living expenses;

(2) outstanding debts and liabilities, secured and unsecured;

(3) whether the defendant has qualified for and is receiving any form of public assistance;

(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and

(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

(C) Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

(D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

(F) Multiple Representation. When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the court must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;

(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

(G) Unanticipated Conflict of Interest. If, in a case of joint representation, a conflict of interest arises at any time, including trial, the lawyer must immediately inform the court. If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate lawyers. The court should on its own initiative inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require.

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings including sentencing and proceedings

leading to possible revocation of youthful trainee status,

(2) filing of interlocutory appeals the lawyer deems appropriate,

(3) responding to any preconviction appeals by the prosecutor, and

(4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

(I) Plan for Appointment. In each county, the court with trial jurisdiction over felony cases must adopt and publish a plan to govern the process of selecting and appointing lawyers to represent indigent defendants and file it with the supreme court clerk and the state court administrator under MCR 8.112(B)(3).

(J) Assistance of Lawyer at Grand Jury Proceedings.

(1) A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness.

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request appoint one for the witness at public expense.

Rule 6.300 Available Pleas

(A) Possible Pleas. Subject to the rules in this subchapter, a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived.

(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court.

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) A defendant who has asserted an insanity defense may enter a plea of guilty but mentally ill or a plea of not guilty by reason of insanity. Before such a plea may be entered, the defendant must comply with the examination required by law.

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) Pleas to Lesser Charges. The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor.

Rule 6.302 Pleas of Guilty and Nolo Contendere.

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be tried by the court without a jury, if the defendant chooses and the prosecutor and court consent;

(c) to be presumed innocent until proved guilty;

(d) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(e) to have the witnesses against the defendant appear at the trial;

(f) to question the witnesses against the defendant;

(g) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(h) to remain silent during the trial;

(i) to not have that silence used against the defendant; and

(j) to testify at the trial if the defendant wants to testify.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and

(a) the defendant's sentence exceeds the guidelines,

(b) the plea is a conditional plea under MCR 6.301(C)(2),

(c) the prosecuting attorney seeks leave to appeal, or

(d) the Court of Appeals or the Supreme Court grants leave to appeal.

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement.

(2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the

sentence agreed to or recommended by the prosecutor; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

(4) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) state why a plea of nolo contendere is appropriate; and

(b) hold a hearing, unless there has been one, that establishes support for a finding that the

defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

(F) Plea Under Advisement; Plea Record. The court may take the plea under advisement. A verbatim record must be made of the plea proceeding.

Rule 6.303 Plea of Guilty but Mentally Ill.

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, but not insane, at the time of the offense to which the plea is entered. The reports must be made a part of the record.

Rule 6.304 Plea of Not Guilty by Reason of Insanity.

(A) Advice to Defendant. Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302 except that subrule (C) of this rule, rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

(B) Additional Advice Required. After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center of forensic psychiatry for up to 60 days, and that after the

examination, the probate court may order the defendant to be committed for an indefinite period of time.

(C) Factual Basis. Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that

(1) the defendant committed the acts charged, and

(2) a reasonable doubt exists about the defendant's legal sanity at the time of the offense.

(D) Report of Plea. After accepting the defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime.

Rule 6.310 Withdrawal or Vacation of Plea Before Acceptance or Sentence.

(A) Withdrawal Before Acceptance. The defendant has a right to withdraw any plea until the court accepts it on the record.

(B) Withdrawal Before Sentence. On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

(C) Vacation of Plea Before Sentence. On the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement.

Rule 6.311 Challenging Plea After Sentence.

(A) Motion to Withdraw Plea. The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal. After the time for filing an application for

leave, the defendant may seek relief in accordance with the procedure set forth in subchapter 6.500.

(B) Remedy. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(C) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Rule 6.312 Effect of Withdrawal or Vacation of Plea.

If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.

Rule 7.203 Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(7), except a judgment or order of the circuit court

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in MCR 7.202(7)(a)(iii)-(v) is limited to the portion of

the order with respect to which there is an appeal of right.

(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;

(B) Appeal by Leave. The court may grant leave to appeal from:

(1) a judgment or order of the circuit court, court of claims, and recorder's court which is not a final judgment appealable of right;

(2) a final judgment entered by the circuit court or the recorder's court on appeal from any other court;

(3) a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court;

(4) any other judgment or order appealable to the Court of Appeals by law or rule;

(5) any judgment or order when an appeal of right could have been taken but was not timely filed.

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements. An application for leave to appeal must be filed within 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1) 5 copies of an application for leave to appeal (one signed), stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2) 5 copies of the judgment or order appealed from, of the calendar or docket entries, of the opinion or findings of the lower court, tribunal or agency, and of any opinion or findings reviewed by the lower court, tribunal or agency;

(3) if the appeal is from an administrative tribunal or agency, or from a circuit court on review of an administrative tribunal or agency, evidence that the tribunal or agency has been requested to send its record to the Court of Appeals;

(4) 1 copy of certain transcripts, as follows:

(a) in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court which conducted the hearing;

(b) in an appeal from the circuit court or recorder's court after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court or recorder's court;

(c) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;

(d) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;

(e) in an appeal from an order granting or denying a new trial, such portion of the transcript of the trial as, in relation to the issues raised, permits the court to determine whether the trial court's decision on the motion was for a legally recognized reason and based on arguable support in the record;

(f) in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion relating to sentencing;

(g) in an appeal raising any other issue, such portion of the transcript as substantiates the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge.

If the transcript is not yet available, or if there is no record to be transcribed, the appellant shall file a copy of the certificate of the court reporter or recorder or a statement by the appellant's attorney as provided in MCR 7.204(C)(2). The appellant must file the transcript with the Court of Appeals as soon as it is available.

(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;

(6) proof that a copy of the filed documents was served on all other parties; and

(7) the entry fee.

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1) 5 copies of an answer to the application (one signed) conforming to MCR 7.212(D), except that transcript page references are not required unless a transcript has been filed; and

(2) proof that a copy was served on the appellant and any other appellee.

(D) Decision.

(1) There is no oral argument. The application is decided on the documents filed and, in an appeal from an administrative tribunal or agency, the certified record.

(2) The court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The

clerk shall enter the court's order and mail copies to the parties.

(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.

(4) Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief.

(E) Emergency Appeal.

(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.

(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period, then the 12 months are counted from the entry of the order denying the motion.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave

to appeal within 21 days after the trial court decides a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing, if the motion was filed within the 12-month period, or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(F)(1) within the 12-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(F)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the docket or calendar entries, or other documentation showing that the application is filed within the time allowed.

(5) [Effective September 1, 2003] The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(G) Certified Concise Statement.

(1) When the Court of Appeals requires a certified concise statement of proceedings and facts, the appellant shall, within 7 days after the order requiring the certified concise statement is certified, serve on all other parties a copy of a proposed concise statement of proceedings and facts, describing the course of

proceedings and the facts pertinent to the issues raised in the application, and notice of hearing with the date, time, and place for settlement of the concise statement.
(2) Hearing on the proposed concise statement must be within 14 days after the proposed concise statement and notice is served on the other parties.
(3) Objections to the proposed concise statement must be filed in writing with the trial court and served on the appellant and any other appellee before the time set for settlement.
(4) The trial court shall promptly settle objections to the proposed concise statement and may correct it or add matters of record necessary to present the issues properly. When a court's discretionary act is being reviewed, the trial court may add to the statement its reasons for the act. Within 7 days after the settlement hearing, the trial court shall certify the proposed or a corrected concise statement of proceedings and facts as fairly presenting the factual basis for the questions to be reviewed as directed by the Court of Appeals. Immediately after certification, the trial court shall send the certified concise statement to the Court of Appeals clerk and serve a copy on each party.

Rule 7.301 Jurisdiction and Term

(A) Jurisdiction. The Supreme Court may:

(1) review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223-9.226);
(2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);
(3) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);
(4) give an advisory opinion (see Const 1963, art 3, § 8);

(5) respond to a certified question (see MCR 7.305);
(6) exercise superintending control over a lower court or tribunal (see, e.g., MCR 7.304);
(7) exercise other jurisdiction as provided by the constitution or by law.

REV. 3/01

APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE

Use this form if you pled guilty, guilty but mentally ill, or nolo contendere for a crime, and you want to appeal your conviction or sentence. See MCR 7.205 for details on filing an application for leave to appeal.

When to file your application for leave to appeal

- Michigan Court Rule requires that you file the application within 12 months after the circuit court entered your judgment of sentence.

- Your appeal is not "filed" until it has been received by a clerk of the Court of Appeals. That means that if you mail your documents, they are not "filed" when you place them in the mailbox. They are filed when they reach the Court of Appeals and they are stamped by the clerk with the date and time of their arrival.

What to do before preparing and filing your application for leave to appeal

- The Court of Appeals needs copies of certain documents to process the appeal. You will probably need to prepare a letter to the circuit court requesting these documents. If you do not receive one or more of these items before filing your application, make 6 copies of the letter to file with the Court of Appeals to show that you have requested them. These documents are:

1. A copy of the register of actions for your case. If you receive it before you file your application, make 6 copies of it.

2. A copy of the plea and sentencing hearing transcripts. If you receive them before you file your application, make 1 copy of them.
3. If you are raising a sentencing issue, the presentence information report. If you receive it before you file your application, make 1 copy of it.

- Get your prisoner account statement for the past 12 months. Make 1 copy.

- Make 5 copies of your judgment of sentence.

Complete the application for leave to appeal and prepare for filing

A copy of the application with instructions on how to fill it out is provided in the form. Print or type.

- Complete the application for leave to appeal including the cover sheet using the instructions. Sign and date the "original" of the application. Make 5 additional copies.
- Attach one copy of the judgment of sentence and register of actions to each of the applications. If you have not received one or both of these items from the circuit court, attach a copy of the request letter instead.

What happens if you don't file your application for leave to appeal correctly?

If you omit one of the required documents, the clerk's office in the Court of Appeals will send you a letter explaining what is defective about your filing and will give you 21 days to correct it. For example, if you wrote a letter to the circuit court asking for the register of actions, but that court has not sent it before you must file your application, then provide a copy of the letter to the Court of Appeals with your application. You will receive a defect letter from the Court of Appeals giving you 21 days to

send the register of actions. By then, you should have received the
register of actions and can forward it to the Court of Appeals.

Page 1

How to file the application

You must file with the Court of Appeals the following documents to correctly submit an application for leave to appeal from your criminal conviction or sentence:

1. Five copies of an application for leave to appeal (including a statement of delay if applicable), one copy signed.

2. Five copies of the judgment of sentence you are appealing.

3. Five copies of the current circuit court register of actions. If the register of actions is not available when you file your application, substitute it with the request letter to the circuit court.

4. One copy of the transcripts of your plea and sentencing hearings. If the transcripts are not available when you file your application, substitute it with the request letter to the circuit court.

5. One copy of your prisoner account statement and certification, if applicable.

6. A check or money order for $250 to cover the entry fee. If you cannot afford to pay the entry fee, then you must file a motion to waive fees, along with an affidavit of indigency and, if you are incarcerated, a

prisoner account statement and certification for the past 12 months.

- Send one copy of the application and attachments to the prosecutor in the county where you were convicted. Complete the proof of service on the "original" and on your copy showing that you mailed a copy to the prosecutor.

Where to file your application for leave to appeal

- Send the "original" application and 4 copies of the application for leave to appeal and attachments, along with one copy of the transcripts (if available) and one copy of the Prisoner Account Statment (if applicable), to the Clerk of the Court of Appeals at one of the addresses below.

Michigan Court of Appeals
1001 Woodward Avenue
Suite 900
Detroit, MI 48226-1970
(313) 256-9212

Michigan Court of Appeals
American Center Bldg
27777 Franklin Rd, Suite 645
Southfield, MI 48034-8256
(248) 353-6763

Michigan Court of Appeals
Washington Square Bldg
109 W. Michigan Avenue
Lansing, MI 48909-7522
(517) 373-0786

Michigan Court of Appeals
State of Michigan Office Bldg
350 Ottawa Street, NW
Grand Rapids, MI 49503-2349
(616) 456-1167

More Instructions

- Keep one copy of the application and attachments for yourself.

- If there are any items which you ordered from the circuit court but did not receive prior to sending your

application, you must forward the appropriate number of copies of these items to the Court of Appeals when you receive them (5 copies of the register of actions, 5 copies of the judgment of sentence, 1 copy of transcripts, 1 copy of presentence information report). You must also send a copy of these items to the prosecutor, and provide a proof of service to the Court of Appeals that you served the prosecutor with these items. You must date and sign this proof of service.

Page 2.

Approved, SCAO

State of Michigan Court of Appeals	APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE	____Circuit Court _____County

People of the State of Michigan	v	Defendant's name, address, and inmate no.

Using the information from your judgment of sentence form, enter the number of the circuit court, the county, and the case number in the upper right-hand corner. Follow the instructions for each of the items. Print or type all information.

STATEMENT OF DELAY

1. This application is being filed more than 21 days after entry of the judgment of sentence because:

__ I did not know until recently that I could appeal the decision.

__ I could not afford the postage and copying costs to file this application.

__ I did not know until recently how to appeal the decision.

__ I needed to get help to complete this application.

__ Other:_____
Explain

APPLICATION

2. I was found guilty of the crime(s) as stated below:

Count	Plea G	Plea NC	Crime	Charge Code(s) MCL citation/PACC Code

*Plea: Check "G" for guilty plea; check "NC" for nolo contendere

3. I was sentenced as stated below by Judge

_____

Name of Judge

[Form on following page.]

Count	Sentence Date	Minimum Yrs	Minimum Mos	Minimum Days	Maximum Years	Maximum Mos	Jail Credit Mos	Jail Credit Days	Date Sentence Begins	Other Info

4. __ I filed with the trial court a request for appointment of an attorney and affidavit of indigency on _____.
Date

Continued on Page 2

MCR 7.205, MCR 7.212, MCL 770.3a(4)

CC 405 (3/01)

APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEAA OF GUILTY OR NOLO CONTENDERE

APPLICATION continued

5. STATEMENT OF QUESTIONS INVOLVED

State the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence. If you need more space, attach additional pages.

_____
_____
_____

6. STATEMENT OF FACTS

Give any facts not stated in items 2, 3, and 4 on page 1 that are relevant to this appeal. You must also state the transcript pages or other parts of the record that support your facts. If you need more space, attach additional pages.

_____
_____
_____

continued on page 3

CC 405 (3/01) **APPLICATION FOR LEAVE TO APPEAL, Page 2**

7. ARGUMENTS

For each issue listed in item 5. on page 2, state the law that supports your position and explain how the law applies to the facts of your case. If you need more space, attach additional pages.

_____

_____

_____

8. RELIEF REQUESTED

State what you want the Court of Appeals to do.

_____

_____

_____ _____

Date Signature

PROOF OF SERVICE

I certify on this date a copy of this application and appropriate attachments were served on the prosecutor of

_____County by ___ personal service. _____ mail.

_____ _____

Date Signature

CC 405 (3/01) **APPLICATION FOR LEAVE TO APPEAL, PAGE 3**